89-1885

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

THAIS CARRIERE, INDIVIDUALLY AND ON BEHALF OF RICHARD DARCEY CARRIERE, SAMUEL CARRIERE, V, LEANORA PAIGE CARRIERE TOMENY, THAIS MARIE CARRIERE AND CLAYTON JOSEPH CARRIERE,

Petitioners,

VS.

SEARS, ROEBUCK & COMPANY, SIZELER REALTY COMPANY, SIZELER REAL ESTATE MANAGEMENT COMPANY, INC., CONNECTICUT GENERAL LIFE INSURANCE COMPANY, ON BEHALF OF ITS SEPARATE ACCOUNT R, WILLIAM MCINNIS AND ALLSTATE INSURANCE COMPANY,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

I.

Is it appropriate for a federal court to combine a motion to remand a removal case with a motion for summary judgment when the only legitimate issue before the court is an allegation of fraudulent joinder of a non-diverse defendant?

II.

Is it appropriate for a federal court to require a state court plaintiff to choose between developing summary judgment data and possibly losing the right to remand a removal case, or to expedite the motion to remand at the risk of having to defend a summary judgment without sufficient factual preparation?

III.

Is it appropriate for a federal court to ignore issues of economy, convenience, fairness and comity by precipitously converting a motion to remand into a summary judgment thereby divesting the state court of its rightful jurisdiction?

IV.

Did the court below err in its application of Louisiana law, and the standard to test removal/remand, on the facts and pleadings presented?

INTERESTED PARTIES

Sears, Roebuck and Company

Sizeler Real Estate Management Company, Inc.

Sizeler Realty Company

William McInnis

Connecticut General Life Insurance Company, on behalf of its separate account R

Allstate Insurance Company

Thais Carriere, individually and on behalf of Richard Darcy Carriere, Samuel Carriere, V, Leanora Paige Carriere Tomeny, Thais Maire Carriere and Clayton Joseph Carriere

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
INTERESTED PARTIES	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
GROUNDS FOR JURISDICTION	2
STATEMENT OF THE CASE	2
Statement of Facts	3
ARGUMENT	
I. The Fifth Circuit Has Adopted a Procedure in Removal/Remand Cases that Threatens the Due Process Rights of State Court Litigants and Threatens the Ordering of Federal/State Relations in Diversity Jurisdiction Litigation	6
II. The Fifth Circuit Procedure Will Create a Conflict of Principles of Federal Adjudication by Pitting the Expedited Remand Procedure Against the More Cautious Summary Judgment Procedure	11
III. The Fifth Circuit Procedure Frustrates the Value of Judicial Economy, Convenience, Fairness and Comity	14

Page

IV. The Courts Below Misconstrued Applicable Louisiana Law in Granting Summary Judgment 15

CONCLUSION 22

APPENDIX A -

Fifth Circuit Opinion, Dated February 2, 1990 A-1

Fifth Circuit Order Denying Rehearing, Dated March 2, 1990 ..... A-2

APPENDIX B -

District Court Minute Entries, Dated July 18, 1988, August 31, 1988, October 25, 1988, November 1, 1988, December 20, 1988 and January 1, 1989..... B-1

District Court Judgment, Dated January 6, 1989 ..... B-2

TABLE OF AUTHORITIES

Cases	Page
B., Inc. v. Miller Brewing Company, 663 F.2d 545 (5th Cir. 1981)	6,7,9,20
Banks v. Hyatt Corporation, 722 F.2d 214 (5th Cir. 1984)	17,18
Barkman v. Wabash, Inc., 674 F. Supp. 623 (N.D. Ill., 1987)	7
Bazley v. Tortorich, 397 So.2d 475 (La. 1981)	16,17
Carnegie-Melton University v. Cohill, 108 S.Ct. 614 (1988)	14
Carriere v. Sears, Roebuck and Company, No. 89-3089, slip opinion at 1873	8,9,10, 15,16
Commercial Associates v. Silcon Gammino, Inc., 670 F. Supp. 461 (D.R.I. 1987)	12
Fegan v. Lykes Steam Ship Company, 3 So.2d 632 (La. 1941)	16
Fristoe v. Reynolds Metal Company, 615 F.2d 1209 (9th Cir. 1980)	12
Harris v. Edward Hyman Co., 664 F.2d 943 (5th Cir. 1981)	11
Harris v. Pizza Hut of Louisiana, 455 So.2d 1364 (La. 1984)	17,18,19
Johnson v. Odeco Oil and Gas Company, 679 F. Supp. 604 (E.D. La. 1987)	12
Keating v. Shell Oil Company, Co., 610 F.2d 328 (5th Cir. 1980)	7,9

Cases	Page
Mandel v. U.S., 719 F.2d 963 (C.A. Ark. 1983) ..	7
McKay v. Boyd Construction Company, Inc., 769 F.2d 1084 (5th Cir. 1985)	12
Mozeke v. International Paper Company, 856 F.2d 722 (5th Cir. 1988)	21
National Life Insurance Co. v. Solomon, 529 F.2d 59 (2nd Cir. 1975).....	10,11
Poller v. Columbia Broadcasting System, 368 U.S. 464 (1962)	7,8,10
Roberts v. Vulcan Material Company, 558 F. Supp. 108 (M.D. La. 1983) 615 F.2d 1209 (9th Cir. 1980).....	12
Schoenbaum v. Firstbrook, 405 F.2d 215 (2nd Cir. 1968).....	13
Slagle v. U.S., 228 F.2d 673 (5th Cir. 1956)	13
Smith v. Walgreens Louisiana Company, Inc., 542 So.2d 766 (La. App. 4th Cir. 1989)	18,19,20
Wade v. Fireman's Fund Insurance Company, 716 F. Supp. 226 (M.D. La. 1989)	12
Waldron v. British Petroleum Company, 231 F. Supp. 72 (S.D. N.Y. 1964)	13,14
Walters v. City of Ocean Springs, 626 F.2d 1317 (5th Cir. 1980)	13
Willie v. American Casualty Company, 547 So.2d 1075 (La. App. 1st Cir. 1989)	17,18,19, 20,21

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OPINIONS BELOW

The Fifth Circuit Court of Appeals in its opinion (reproduced as Appendix dated February 2, 1990 and cited as Carriere v. Sears, Roebuck and Co., No. 89-3089, slip op. at 1871 (5th Cir. Feb. 2, 1990), affirmed the judgment of the United States District Court for the Eastern District of Louisiana (reproduced as Appendix B-2) dated January 6, 1989 wherein the district court rendered a summary judgment against Thais Carriere,

et al and affirmed that summary judgment procedure was properly subsumed into the question of remand and that the employee was fraudulently joined to defeat federal jurisdiction; real estate management company was fraudulently joined to defeat federal jurisdiction; denial of motion for continuance to conduct discovery before hearing on summary judgment motions was not abuse of discretion; and owner of adjacent business premises did not have duty to protect security supervisor from risk of criminal harm.

GROUNDS FOR JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. §1254 (1). Petitioners seek a writ of certiorari to review the decision of the Fifth Circuit dated February 2, 1990, the petition for rehearing of which was denied by an order dated March 2, 1990.

STATEMENT OF THE CASE

This action arose out of the murder of Samuel Carriere, IV while employed as an unarmed security guard at the Sears, Roebuck and Company store located in the Lake Forest Shopping Mall, New Orleans, Louisiana. The original Petition for Damages was filed in the Civil District Court in the Parish of Orleans against diverse and non-diverse defendants. Subsequently, the case was removed to the United States District Court for the Eastern District of Louisiana on grounds of fraudulent joinder of non-diverse defendants. The district court denied petitioners' Motion to Remand and granted summary judgment "subsumed in the opposition to remand" to one of the non-diverse defendants and summary judgment to one of the diverse defendants. The district court, thereafter, dismissed the other non-diverse defendant for failure of petitioners to serve timely under the federal rules and granted summary judgment to all other defendants. The Fifth Circuit approved the method of subsuming the summary judgment procedure into remand procedure and affirmed the district court.

The Fifth Circuit denied petitioners' Motion for Rehearing.

STATEMENT OF THE FACTS

The deceased, Samuel Carriere, IV, was murdered on February 2, 1987 at the Sears, Roebuck and Company ("Sears") store loading dock in New Orleans, Louisiana by unknown assailants. At the time of his death, Carriere was working as an unarmed security guard for Sears. Sizeler Realty Company and/or Sizeler Real Estate Management Company, Inc. ("Sizeler Interests") were the managers of the Lake Forest shopping mall where the Sears store was located. Connecticut General Life Insurance Company on Behalf of Its Separate Account R ("Connecticut General") was the owner of the shopping mall where the Sears store was located. William McInnis was an off-duty New Orleans Police Department officer working on special assignment for Sears at the Sears store where Carriere was murdered. Allstate Insurance Company was the alleged insurer of Sears and McInnis for the liability asserted in the lawsuit.

On February 3, 1988 the widow Thais Carriere individually, and on behalf of her five children, Richard, Samuel, V, Leanora, Thais and Clayton filed a petition for damages in the state court in New Orleans, Louisiana against Sizeler Interests, Sears, Connecticut General, McInnis and Allstate under purely state law theories of negligence and intentional tort. Sizeler Interests and McInnis are citizens of the State of Louisiana. Sears, Connecticut General and Allstate are foreign corporations domiciled outside the State of Louisiana.

On *March 7, 1988* Sears, Connecticut General and Allstate filed a Petition for Removal from the state court to the United States District Court for the Eastern District of Louisiana. On *March 24, 1988* based on the incomplete diversity of citizenship, petitioners moved to remand the case to the state court. On *April 12, 1988* Sears and Allstate filed their Opposition to the Motion to Remand attaching affidavits of McInnis, Gene Looper, Sears' Director of Security, Thurman Thomas, a Sears' store manager and Sandra Phillips, a manager for defendant, Allstate. This opposition to remand contended that McInnis and Sizeler Interests had been "fraudulently joined" and defendants supported this contention with the factual affidavits referred to

above. On *April 12, 1988* Sizeler Interests and Connecticut General filed an opposition to remand, adopting the position and argument of Sears and attaching the affidavit of Maurice Burke, general counsel for Sizeler Interests.

On *May 25, 1988* Sizeler Interests the non-diverse defendant filed a Motion for Summary Judgment attaching the affidavits of Joel Jacobs, a Sizeler vice president, Thurmon Williams, a Sears' employee, along with plot plans of the shopping mall and legal descriptions of the Sears site. These affidavits and exhibits pertained exclusively to factual issues. On *May 27, 1988* Sizeler Interests filed a Motion for Leave to consider their memorandum in support of their summary judgment a supplemental opposition to the motion to remand which was granted by the Court. The hearing on petitioners' Motion to Remand and defendant's Summary Judgment was set for *July 13, 1988*, approximately six weeks after the issue of fraudulent joinder and summary judgment were first pled by defendants. On *July 6, 1988* petitioners filed an Opposition to Summary Judgment attaching the affidavits of John Hance, a Sears' store engineer, Juan Woolfolk, a Sears' security employee, Addie Fanguy, a New Orleans Police Department detective and Betty Cox, a Sears' employee. These affidavits were filed in an attempt to hurriedly contest factual issues raised by defendants' affidavits. Additionally, counsel for petitioners filed a motion to continue the hearing with his attached affidavit setting forth the need for specific discovery and requesting an expedited hearing on this Motion.

On *July 13, 1988*, the morning of the hearing on the Motion to Remand and Sizeler's Motion for Summary Judgment, counsel for petitioners was served by hand with a motion to strike the affidavits attached to petitioners' Opposition to Summary Judgment on the grounds that three of the affidavits were not signed in the presence of the notary. The Court heard argument on July 13, 1988 and issued a Minute Entry on July 15, 1988 granting summary judgment in favor of Sears and Sizeler Interests and granting Sears' Motion to Strike the affidavits. The Court, according to its Minute Entry of August 29, 1988 mistakenly granted summary judgment to Connecticut General as well, which had never filed a motion and remanded a workmen's compensation claim which did not exist.

On *July 25, 1988* petitioners filed a motion for relief from the July 15th Minute Entry on the grounds that the Court did not consider or rule on petitioners' Motion to Continue for additional time to conduct discovery and that petitioners' affidavits should not have been stricken for technical deficiencies which only applied to three of the affidavits and could easily have been cured in those three. Furthermore, petitioners complained that they had not been given an opportunity to oppose the Motion to Strike which was served the morning of the hearing.

On *August 29, 1988*, without reasons, the Court denied petitioners' Motion for Relief.

On *October 31, 1988* the District Court dismissed the other non-diverse defendant, William McInnis for lack of service within one hundred and twenty days of the original complaint. The Court also dismissed Allstate on summary judgment at the same time.

On *September 26, 1988* the remaining defendant, Connecticut General, filed a Motion for Summary Judgment and on December 20, 1988 the Court granted that Motion.

On January 11, 1989 the Court entered final judgment against petitioners and petitioners appealed to the Fifth Circuit Court of Appeal. The Fifth Circuit affirmed the District Court. Petitioners sought rehearing which was denied and now seek review by the Honorable United States Supreme Court.

REASONS FOR GRANTING THE WRIT

I.

The Fifth Circuit Has Adopted A Procedure In Removal/Remand Cases That Threatens The Due Process Rights Of State Court Litigants And Threatens The Ordering Of Federal/State Relations In Diversity Jurisdiction Litigation

One hundred and sixty-nine days is not a very long time from start to end of a complex, multi-defendant personal injury case that resulted in the death of the plaintiffs' husband/father. It is especially not a very long time when the case started in state court by the choice of the plaintiffs and was removed to federal court where it ended by summary judgment shortly after removal and despite the presence of non-diverse defendants. All without affording plaintiffs anything like their day in Court.

This managed to happen because the district court, and ultimately the U.S. Fifth Circuit, made an unprecedented leap from an accepted procedure for testing fraudulent joinder claims, to one that burdened plaintiffs with a premature summary judgment that assured the swift termination of the case.

Specifically, the Fifth Circuit has, in this case, approved of combining the remand/fraudulent joinder determination with consideration of defendants' motions for summary judgment. In doing so, the Fifth Circuit distorted its own precedent in *B., Inc. v. Miller Brewing Company*, 663 F.2d 545 (5th Cir. 1981).

In *B., Inc.*, the Fifth Circuit approved, as had other circuits, a somewhat more expansive analysis of remand motions based upon fraudulent joinder of non-diverse parties. The procedure approved in *B., Inc.* was *analogized* to the summary judgment procedure:

> Thus, the proceeding appropriate for resolving a claim of fraudulent joinder is similar to that used for ruling

> on a motion for summary judgment under Fed. R. Civ. P., Rule 56(b).

663 F.2d at 549, n. 9 (emphasis added).

This similarity was obviously not intended to *be* a summary judgment. *B., Inc.* cited *Keating v. Shell Oil Company, Co.*, 610 F.2d 328 (5th Cir. 1980). *Keating*, for its part, approved of " 'piercing the pleadings' to determine if the joinder was fraudulent, that is, whether under any set of facts alleged in the petition, a claim against the defendants could be asserted under Louisiana law". 610 F.2d at 331. However, the entire thrust of *Keating* and its progeny is to determine if a cause of action has been alleged *not* whether plaintiff should prevail on the merits:

> Whether reference to state law amounts to "pre-trying" the case is always a question of degree. If there is any possibility that the facts the plaintiff alleges could support a claim, *then a dismissal under Rule 12(b)(6)* is improper. But when the lack of a state law claim is apparent, dismissal at this point in the proceedings does not constitute a premature trial on the merits.

610 F.2d at 331-32 (emphasis added).

Of course, a dismissal under Federal Rule 12(b)(6) is a vastly different matter than a summary judgment under Rule 56(b). Rule 12(b)(6) is used to test the sufficiency of the complaint, *not to decide the merits*. *See Barkman v. Wabash, Inc.*, 674 F. Supp. 623 (N.D. Ill., 1987). By definition, then, a 12(b)(6) dismissal is not a pretrial whereas a summary judgment is. *See Mandel v. U.S.*, 719 F.2d 963 (C.A. Ark. 1983).

Consequently, to confuse a "piercing of the pleadings" for testing a motion to remand with a full blown summary judgment threatens to divest casually a state court of its rightful jurisdiction *and* to deny state court litigants of their "day in court". *See Poller v. Columbia Broadcasting System*, 368 U.S. 464 (1962) (reversing

trial court and appellate court grant of summary judgment saying "the purpose of the rule is not to cut litigants off from their right of trial by jury if they really have issues to try" at 468).

Practically the difference is quite significant. A dismissal under Rule 12(b)(6) in a remand case requires the plaintiff to demonstrate to the appellate court that the pleadings, even when "pierced" do state a sufficient claim under the controlling state's law. Whereas, a summary judgment locks the plaintiff into a record, insufficiently developed, that requires a demonstration of ultimate success on the merits.

The procedure adopted by the Fifth Circuit, in effect, railroads the plaintiff into a grossly premature defense of the merits of his case when the only issue should be the federal court's jurisdiction *vel non*.

The Fifth Circuit seemed to have misunderstood this distinction urged by plaintiffs. The court mischaracterized the plaintiff's position:

> In plaintiff's view, the district court should have accepted the factual allegations of the original state court petition and should not have considered affidavits and depositions in deciding the merits of the *motion to remand*.

Carriere v. Sears, Roebuck and Company, No. 89-3089, slip opinion at 1873 emphasis added).

Clearly, plaintiffs did not dispute such a procedure for "deciding the merits of the *motion to remand*". Plaintiffs unambiguously noted in their brief to the Fifth Circuit:

> Plaintiffs vigorously maintained that the motion to remand should only address the purely jurisdictional (threshold) question, i.e. whether the federal district court was the appropriate forum for entertaining this controversy, *it was not the appropriate time to adduce, evaluate, and judge facts that concerned the substance*

> *and merits of the claims.* Plaintiffs were negatively overwhelmed with the Court's apparent zeal to *dispose of their claim with inordinate haste.*
>
> Appellants Brief at 6 (emphasis added).

Therefore, the Fifth Circuit masks plaintiffs' real objection by ascribing it solely to the remand issue, which was not the crux of the problem. Consequently, the Fifth Circuit opinion appears to be a simple application of the *B., Inc.* and *Keating* procedure of piercing the pleadings for remand analysis when, in fact, it goes much farther.

Indeed, *B., Inc.* and *Keating* cannot be read to support the opinion below. *Keating*, for example, cautioned strongly against pretrying the case on a remand motion. *B., Inc.*, for its part, virtually railed against such a rush to judgment:

> A district court need not and should not conduct a full scale evidentiary hearing on questions of fact affecting the ultimate issues of substantive liability in a case in order to make a preliminary determination as to the existence of subject matter jurisdiction.
>
> 663 F.2d at 551.

In a footnote, the court added:

> [T]he trial court may hold an evidentiary hearing to resolve these limited questions of *jurisdictional fact.* However, *where the disputed factual issues relate to matters of substance rather than jurisdiction*, e.g. did the tort occur? was there a privilege? was there a contract? etc. *All doubts are to be resolved in favor of the plaintiff.*
>
> 663 F.2d at 551 N.14 (emphasis added).

By citing *B., Inc.* and ignoring this language, the Fifth Circuit in this case again pretends that no significant change has

occurred in its removal/remand procedure, which is not remotely correct. Not only were jurisdictional facts[1] assessed, but so were disputed substantive facts and they were resolved *against* plaintiffs.

These forbidden substantive areas are precisely the type of issues that the district court considered in these proceedings. Defendants submitted, and the court considered, a tremendous quantity of documentary evidence which did little more than traverse the factual allegations in plaintiffs' state court petition, support defendant's substantive and general denial of liability, and opine that plaintiffs' claim was ill-founded.

Allowing such a procedure to be mixed with the jurisdictional issue raised by a motion to remand shortcircuits Louisiana's entire civil judicial system and the procedural protection afforded its citizens. Trial by affidavit is no substitute for trial by jury, which has for so long been the hallmark of "even-handed justice". *See, e.g., Poller v. Columbia Broadcasting System*, 368 U.S. 464 (1961). Summary judgment is a drastic device, it should not be granted when there are major contentions in dispute and the litigants rightful focus should be on jurisdictional facts. Moreover, summary judgment is wholly inappropriate when so little time for discovery has been allowed. *See e.g., National Life Insurance Co. v. Solomon*, 529 F.2d 59 (2nd Cir. 1975).

This devastating combination of a motion to remand and summary judgment is particularly menacing when, as in this case, the plaintiffs are not given sufficient time to develop the facts necessary to fend off the summary judgment.

In this case the district court's grant of summary judgment against plaintiffs was accompanied by a refusal to allow plaintiffs additional time for discovery. Plaintiffs alleged causes of action

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[1] The *B., Inc.* court explained what it meant by "jurisdictional facts": "Thus, where the removing party alleges that the named in-state defendant does not even exist. . .; or that there is a contested question of fact regarding the true domicile of the parties . . . the trial court may hold an evidentiary hearing to resolve these limited questions of jurisdictional fact. 663 F.2d at 551 N.14.

based in negligence and intentional misconduct. In such cases, where knowledge and intent are such prominent issues, the facts and evidence are most often in the hands and minds of the tortfeasors. When plaintiffs are denied sufficient opportunity to get at this evidence, their opposition to summary judgment is formalistic at best.

II.

The Fifth Circuit Procedure Will Create A Conflict Of Principles Of Federal Adjudication By Pitting The Expedited Remand Procedure Against The More Cautious Summary Judgment Procedure

The Fifth Circuit ruling in this case creates an irreconcilable dilemma for state court litigants whose case has been removed to federal court. All circuits, the Fifth Circuit included, have held that a plaintiff's delay in seeking remand may constitute a waiver of the right to remand. Indeed, certain bases for remand must be filed within 30 days of the notice of removal. *See* 28 U.S.C. 1447(c).

For example, *Harris v. Edward Hyman Co.*, 664 F.2d 943 (5th Cir. 1981) held:

> The record indicates that subsequent to the action being removed from the Chancery Court of Copia County, Harris [plaintiff] served on both Edward Hyman and the Union [defendants] Requests for Admissions, Requests for Production of Documents, and a set of Interrogatories. Harris also responded to Edward Hyman's Request for Production of Documents.
>
> Indeed, until the Motion to Remand was filed, the action proceeded as any other with Harris giving no indication that she was dissatisfied with her federal forum. ***These acts are consistent with a waiver of a litigant's right to seek a remand to state court and the district court could have found so.***
>
> 664 F.2d at 945 (emphasis added).

Accord: Johnson v. Odeco Oil and Gas Company, 679 F. Supp. 604, 605 (E.D. La. 1987) (plaintiff's failure to object to removal for ten months and his participation in discovery in the case in federal court constituted a waiver of his right to remand the case to state court); *Wade v. Fireman's Fund Insurance Company*, 716 F. Supp. 226, 228 (M.D. La. 1989) (plaintiff waived his right to remand by actively participating in discovery process and attending two status conferences); *Roberts v. Vulcan Material Company*, 558 F. Supp. 108, 109 (M.D. La. 1983) (either active participation by invoking this process of the federal court or a delay by the plaintiff in objecting to removal can constitute a waiver of defects in a removal petition); *Fristoe v. Reynolds Metal Company*, 615 F.2d 1209, 1212 (9th Cir. 1980) (although the defendant failed to file the removal petition timely, and a timely objection to a late petition will defeat removal, a party may waive the defect or be estopped from objecting to the untimeliness by sitting on his rights).

More directly, in *McKay v. Boyd Construction Company. Inc.*, 769 F.2d 1084 (5th Cir. 1985) the court held that a plaintiff could, by his conduct in a federal court proceeding, waive his right to remand a case despite the presence of a non-diverse defendant:

> Technically, Boyd's motion for removal should not have been granted in the first place. Although Section 1441 permits the removal of cases based on diversity jurisdiction, it does not apply to those cases where any defendant is a resident of the state in which the suit was brought. Boyd is a Mississippi corporation. *McKay, however, waived this defect by proceeding in federal court without objection.*
>
> 769 F.2d at 1086 (emphasis added).

See also Commercial Associates v. Silcon Gammino, Inc., 670 F. Supp. 461 (D.R.I. 1987) (plaintiffs' failure to prosecute their motion to remand within five and a half months constitutes a waiver of remand).

The clear federal adjudicative value operative in these cases is speed and expediency. Therefore, delay and development of the case, even by discovery, in the federal court may constitute a waiver of the right to remand.

Conversely, the clear value in the motion for summary judgment is caution and opportunity to develop the factual basis to support or oppose such motion.

For example, *Schoenbaum v. Firstbrook*, 405 F.2d 215, 218 (2nd Cir. 1968) said:

> The plaintiff typically has in his possession only the facts which he alleges in his complaint. Having little or no familiarity with the internal affairs of the corporation, he is faced with affidavits setting forth in great detail management's version of what actions were taken and what motives led affiants to take these actions. Since the facts in such a case are exclusively in the possession of the defendants, summary judgment should not ordinarily be granted where the facts alleged by the plaintiff provide a ground for recovery, at least not without allowing discovery in order to provide plaintiff the possibility of counteracting the effect of defendants' affidavits.

See also Walters v. City of Ocean Springs, 626 F.2d 1317, 1321 (5th Cir. 1980) and *Slagle v. U.S.*, 228 F.2d 673, 678 (5th Cir. 1956) (summary judgment proponent's exclusive knowledge is a circumstance universally considered as giving the non-moving party a peculiar claim to delay sufficient for the orderly discovery and development of facts).

Indeed, Rule 56 itself recognizes in subsection (F) that continuances may be needed and granted "to permit affidavits to be obtained or depositions to be taken or discovery to be had" in order to allow opposing party a meaningful opportunity to defend the motion. In the instant case the district court denied plaintiffs' Rule 56(F) motion. See *also Waldron v. British Petroleum Company*, 231 F. Supp. 72, 94 (S.D. N.Y. 1964) [Rule

56(F) motions should be liberally granted . . . especially where . . . all of the allegedly material facts are within the exclusive knowledge of the opposing party).

The net result is that the plaintiff faced with removal/remand, after the opinion in the instant case, cannot possibly know how to proceed. Should he file his motion to remand quickly, as the statute and cases say he should, and thereby face a coupling of the removal with a summary judgment that he cannot possibly prepare to defeat. Or should he delay and gather the ammunition to defend the expected motion for summary judgment and possibly waive some or all of his arguments for remand. No one is well served by this dilemma. State courts lose control of cases rightfully before them. Federal courts appear heavy-handed and intrusive. Judicial economy is not well served because either remand proceedings will be delayed impermissibly or summary judgment will be accelerated unfairly. In either event further unnecessary litigation, especially appeals, will occur.

III.

The Fifth Circuit Procedure Frustrates The Values Of Judicial Economy, Convenience, Fairness And Comity

It has been noted above just how the instant case threatens important judicial values. However, to the foregoing conclusion can be added the voice of this Honorable Court speaking in the recent case of *Carnegie-Mellon University v. Cohill*, 108 S.Ct. 614 (1988). In *Cohill* this Court discussed another aspect of removal/remand dealing with pendent jurisdiction over a voluntarily dismissed federal claim, which removed all federal matters from the case. In deciding that a district court could remand such a case, this Court said: "[T]he values of economy, convenience, fairness and comity, would support remand since "[b]oth litigants and states have an interest in the prompt and efficient resolution of controversies based on state law". 108 S.Ct. at 620. These same values are not well served by a procedure that ostensibly tests jurisdiction, but in fact forces a premature trial of the merits by affidavits and severely limited discovery.

The federal judiciary has no interest in this matter beyond determining the fraudulent joinder question. If fraudulent joinder is found, the nondiverse plaintiffs should be dismissed under rule 12(b)(6). That matter is then ripe for appeal. To go beyond that is to wrest away from the litigants and the states matters of primary, and perhaps, exclusive interest to them.

IV.

The Courts Below Misconstrued Applicable Louisiana Law And Their Duty To Construe All Facts Most Favorably To Plaintiffs In Granting Summary Judgment

A.

Clearly, the district court and the Fifth Circuit did not construe all disputed facts in plaintiffs' favor with respect to William McInnis, decedent's co-employee. As the Fifth Circuit noted, there was a conflict between Mr. McInnis' affidavit and the affidavits of the investigating police officer. The McInnis affidavit, as cited by the court, says "that he [McInnis] saw Carriere leave the control room but had no knowledge where Carriere was going or that he was likely to be in danger". Slip opinion at 1874-75.

Yet, the court noted that the police officer's affidavit said that "McInnis told him after the incident that he 'should have' accompanied Carriere to the loading dock". *Id.* at 1875.

This constitutes a clear conflict on a substantive issue of fact. One affidavit, based upon statements made immediately after the incident, indicates that McInnis knew where decedent was going and that he *should* have gone with him. On the other hand, the subsequent McInnis affidavit, submitted long after the fact and in support of summary judgment, shows a McInnis who did know where decedent was going or that he might be in danger. Clearly, this is a credibility question undergirding a serious, critical factual dispute. Nonetheless, the Court resolved it in favor of defendant!

> The officer's affidavit, the only factual support for the plaintiffs' intentional act allegation, shows only that McInnis, after Carriere's tragic murder, wished he had accompanied Carriere to assist him.
>
> Slip opinion a 1875 (emphasis added).

To interpret McInnis' statement to the investigating officer as a mere wish, and thereby concluded that summary judgment should be granted to defendant is clearly to resolve the factual dispute in favor of *defendant*, contrary to the federal rules. This is apparent simply by noting that if the court had interpreted the word "should" as expressing an *obligation* rather than a wish, plaintiffs would have shown a *possibility* of a state cause of action.

Interestingly, *The American College Dictionary* (Random House) gives as its first definition of the word "should" the word *"shall"*! Similarly, *Black's Law Dictionary* defines should as: "The past tense of shall ... ordinarily implying *duty* or *obligation*. (Emphasis added). "Shall", then, is defined as a "word of command, and one which has always or which must be given compulsory meaning; as denoting obligation". *See also, Fegan v. Lykes Steam Ship Company*, 3 So.2d 632, 635 (La. 1941) interpreting should to "clearly imply *obligation*", (emphasis added).

Clearly, then, had the court below truly resolved factual disputes in favor of the non-removing party, it would have read Mr. McInnis' statement to the police officer as one recognizing his *obligation* – not his wish – to accompany the decedent to the loading dock. Once viewed as an obligation, the "possibility" of showing substantial certainty, and therefore intent, is clearly present. As the Louisiana Supreme Court said in *Bazley v. Tortorich*, 397 So.2d 475 (La. 1981):

> Intent is not, however, limited to consequences which are desired. If the actor knows that the consequences are certain, or substantially certain, to result from this

> act, and still goes ahead, he is treated by the law as if he had in fact desired to produce the result.
>
> *Id.* at 482.

B.

The Fifth Circuit also erred in ruling that Sizeler Real Estate Management Company was also fraudulently joined, and in granting Sizeler summary judgment. In so doing, the court misconstrued *Harris v. Pizza Hut of Louisiana*, 455 So.2d 1364 (La. 1984), saying that in *Harris* "the Louisiana Supreme Court found that Pizza Hut assumed a duty to protect customers on its premises . . . ." Slip opinion at 1875. The Fifth Circuit then concluded that the "case before us has none of the features of *Harris*" since Sizeler had no *special relationship* with the decedent; nor was decedent a Sizeler patron.

This analysis overlooks the more widely accepted view of *Harris* represented in *Willie v. American Casualty Company*, 547 So.2d 1075 (La. App. 1st Cir. 1989), which was decided after the instant case was submitted, but which was supplied to the Fifth Circuit by plaintiffs' counsel's letter dated October 30, 1989.

In *Willie* the Louisiana First Circuit explicitly rejects the Fifth Circuit's view of *Harris*:

> We reject outright the contention that *Harris v. Pizza Hut*, 455 So.2d 1364 (La. 1984), limits the duty to protect one's business patrons so that the duty to protect can be breached *only* when a business has assumed such duty. In *Harris*, those were simply the facts: the duty had been assumed and was negligently performed. . . . Moreover, language in *Harris* indicates the contrary:
>
> > The issue of a business establishment's liability to a patron for criminal assault by a third party is discussed in *Banks v. Hyatt Corporation*, 722

> F.2d 214 (5th Cir. 1984). *Although, Banks dealt with an innkeeper's liability, any business which invites the company of the public must take "reasonably necessary acts to guard against the predictable risks of assault".*
>
> 547 So.2d 1082 (emphasis added).

The *Willie* court went on to conclude that foreseeable criminal conduct alone can create the duty of the owner to provide protection whether or not that duty had been voluntarily assumed:

> The issue here is whether the trial court's instruction that prior criminal activity may be taken into account to determine the foreseeability of a particular criminal act was error. We think not. *Implicit in the passages from Harris and Miles quoted hereinabove is that some level of criminal activity could impose a duty to post warnings or increase security because crime is foreseeable under what circumstances is a question of fact.*
>
> 547 So.2d at 1083 (emphasis partially added).

Willie, therefore, directly contradicts the Fifth Circuit's conclusion that there is no possibility of recovery against Sizeler because "the facts do not support the conclusion that Sizeler *assumed a duty* to protect Sears' property or personnel". Slip opinion at 1876 (emphasis added). Plaintiff need not supply such facts since assumption of a duty is not required by Louisiana law.

The Louisiana Fourth Circuit has also taken the *Willie* position in reversing a summary judgment for a defendant in an assault case. *Smith v. Walareens Louisiana Company, Inc.*, 542 So.2d 766 (La. App. 4th Cir. 1989) interprets *Harris* exactly as does the state First Circuit. Citing *Harris* the court concludes:

> First, "any business which invites the company of the public must take reasonably necessary acts to guard

> against the predictable risk of assaults". . . . One jurisprudential exception to this rule occurs when the plaintiff's injuries are caused by the unforeseeable or unanticipated criminal acts of third parties. . . . Secondly, once a Louisiana business has voluntarily assumed a duty of protection, that duty "must be performed with due care".
>
> 542 So.2d at 767.

Clearly, the Fourth Circuit read *Harris* to mean a duty to protect against criminal assault *may* exist independent of any voluntary assumption of such a duty.

The *Smith* court went on to say evidence of prior criminality would be relevant to determining the duty *vel non*, and such evidence could only be assessed in a trial:

> In light of the previous case law in this area, absent proof of specific incidents of crime *prior to*, not simply around the time of, plaintiff's attack, we are unable to say that this incident was foreseeable. The issue should be referred to the trial on the merits.
>
> 542 So.2d at 768 (emphasis by court).

Consequently, it is beyond argument that, based upon *Willie* and *Smith*, in at least two Louisiana circuits, including the one governing this case, plaintiffs' action against Sizeler would not meet with an adverse summary judgment such as granted by the Fifth Circuit.

This conclusion also applies to the court's dependence on the fact that Carriere was not a "patron" of Sizeler's. Both *Willie* and *Smith* reject this as a basis for rejecting a cause of action such as this under Louisiana law.

Smith, for example, says:

> The general rule is that commercial establishments have a duty to take reasonable precautions to protect against assaults *on their property*. . . . In most of the cases dealing with this issue, patrons were involved. However, if the plaintiff in the instant case had permission to park in the lot because her employer was extending consideration to the defendant, the relationship between the parties is very similar to the relationship between merchants and patrons since the merchant is gaining a benefit. The existence of a valid business relationship between the parties is therefore material to the determination of the existence of a duty on the part of defendant to protect the plaintiff from assault. *This issue must be determined before the motion for summary judgment can be properly granted.*
>
> 542 So.2d at 769 (emphasis added).

In the instant case, it is inappropriate to deny remand and grant summary judgment when the issue of the relationship between Carriere and Sizeler is in dispute, which means it should be resolved in favor of plaintiffs. Therefore, such a resolution would mean a relationship must be presumed thereby creating a clear *possibility* of recovery from Sizeler. *See, B., Inc., supra.*

Willie, on the other hand, is even more expansive on the point:

> We believe that it is of no moment that [plaintiffs] were not on Town and Country premises to patronize one of its businesses. The status of an individual injured on someone else's property has *long* been held not determinative of the duty owed. . . . It is because a shopping center like Town and Country is open to the *public*, without inquiry into the particular business concerns of persons entering the premises, that *the duty to protect members of the public entering the premises*, as recognized herein, *is imposed.*
>
> 547 So.2d at 1085 (emphasis partially added).

Willie went on to hold both the owners and manager of the shopping center liable for the criminal abduction and assault of plaintiffs who were not at the time "patrons" of the center.

In a diversity case the federal court is clearly obligated to apply Louisiana law as it believes a Louisiana court would interpret it if presented with the issue. See, *Mozeke v. International Paper Company*, 856 F.2d 722 (5th Cir. 1988). This is especially important in a remand case since to make a bad *Erie* guess unfairly and unnecessarily divests the state court of its rightful jurisdiction.

CONCLUSION

The U. S. Fifth Circuit has erred seriously in its ruling in the instant case. The results of this error not only affect the plaintiffs in this case, but also affect the entire ordering of state/federal relations in removal/remand matters. Moreover, the procedure approved by the Fifth Circuit will spawn massive additional litigation as plaintiffs try to guess whether they are better protected by a quick remand hearing or a more cautious development of summary judgment materials. Consequently, it is in the best interest of judicial economy, federalism, comity and, above all, fairness that this Court grant the instant writ to fully consider this matter.

Respectfully submitted,

GERTLER, GERTLER & VINCENT

BY: _____

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APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 89-3089

D.C. Docket No. CA-88-974-M

THAIS CARRIERE, Widow of Samuel Carriere, IV
Individually and on Behalf of her Minor Child, et al.,

Plaintiffs-Appellants,

versus

SEARS, ROEBUCK AND COMPANY, ET AL.,

Defendants-Appellees.

Appeal from the United States District Court for the Eastern District of Louisiana

Before DAVIS and SMITH, Circuit Judges, and LITTLE*, District Judge.

J U D G M E N T

This cause came on to be heard on the record on appeal and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the District Court in this cause is affirmed.

IT IS FURTHER ORDERED that plaintiffs-appellants pay to defendants-appellees the costs on appeal to be taxed by the Clerk of this Court.

February 2, 1990

ISSUED AS MANDATE: MAR 12 1990

*District Judge of the Western District of Louisiana, sitting by designation.

Thais CARRIERE, Widow of Samuel Carriere, IV, Individually and on Behalf of her Minor Child, et al., Plaintiffs-Appellants,

v.

SEARS, ROEBUCK AND COMPANY, et al., Defendants-Appellees.

No. 89-3089.

United States Court of Appeals, Fifth Circuit.

Feb. 2, 1990.

Survivors of security guard, who was killed while investigating suspicious activity on employer's loading dock, brought wrongful death and survival action against employer, coemployee, owner of adjacent business premises, and real estate management firm which was hired to provide security for owner of adjacent premises. Action was removed. Survivors filed motion to remand. Employer, real estate management company, and owner of adjacent premises filed motions for summary judgment. The United States District Court for the Eastern District of Louisiana, Peter Beer, J., denied motion to remand and granted summary judgment motions. Survivors appealed. The Court of Appeals, W. Eugene Davis, Circuit Judge, held that: (1) employee was fraudulently joined to defeat federal jurisdiction; (2) real estate management company was fraudulently joined to defeat federal jurisdiction; (3) denial of motion for continuance to conduct discovery before hearing on summary judgment motions was not abuse of discretion; and (4) owner of adjacent business premises did not have duty to protect security supervisor from risk of criminal harm.

Affirmed.

Appeal from the United District Court for the Eastern District of Louisiana.

Before DAVIS and SMITH, Circuit Judges, and LITTLE, District Judge.[1]

W. EUGENE DAVIS, Circuit Judge:

The survivors of Samuel Carriere appeal the removal and eventual dismissal of their wrongful death and survival actions against a number of defendants. We affirm.

I.

Samuel Carriere, a Sears, Roebuck and Company (Sears) security supervisor, was killed by unidentified assailants while he was investigating suspicious activity on the Sears loading dock. William McInnis, a part-time Sears security employee, was also on duty when the incident occurred.

The Sears store where this incident occurred is located in a shopping mall that is owned by a number of owners in distinct parcels. Sears owns the tract on which its store is located, and Connecticut General Life Insurance Company (Connecticut General) owns the adjoining tract. Sears handles its own security; Connecticut General contracted with Sizeler Real Estate Management Company (Sizeler), to provide the security on its property.

Carriere's survivors filed a state court action against McInnis, Sears, Connecticut General, and Sizeler. Two of the defendants, Sizeler and McInnis, were nondiverse. The diverse defendants removed the case and alleged that the plaintiffs had fraudulently joined the nondiverse defendants. Carriere made a timely motion to remand; Sizeler and Sears filed motions for summary judgment.

[1] District Judge for the Western District of Louisiana, sitting by designation.

The district court set a single hearing date for both the motion to remand and the motions for summary judgment. Before the hearing on these motions, the plaintiffs sought a continuance to conduct further discovery. The trial court, noting that it had granted two previous motions to continue the hearing, denied a further continuance and went forward with the hearing. Finding that the nondiverse defendants were fraudulently joined, the district court denied the motion to remand. The court then struck all of the plaintiffs' affidavits for various deficiencies and granted summary judgment to Sears and Sizeler.

The court also later granted Connecticut General's motion for summary judgment. Carriere's survivors in this appeal complain that the district court erred in: (1) denying their motion to remand; (2) refusing to continue the hearing to permit them to conduct further discovery; and (3) granting the summary judgment motions of Sizeler and Connecticut General.

II.

A.

[1] The plaintiffs first contend that the district court erred in denying the motion to remand.[3] In particular, the plaintiffs complain of the district court's ruling that defendants McInnis and Sizeler were fraudulently joined to defeat federal jurisdiction. In the plaintiffs' view, the district court should have accepted the factual allegations of the original state court petition and should not have considered affidavits and depositions in deciding the merits of the motion to remand.

While we have frequently cautioned the district courts against pretrying a case to determine removal jurisdiction, we have also

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[3] Appellees, relying on Ninth Circuit authority, contend that because Carriere's survivors did not seek interlocutory review of the district court's denial of their motion to remand, they are now foreclosed from seeking such review. See *Johnson v. Mutual Benefit Life Ins. Co.*, 847 F.2d 600, 602-03 (9th Cir. 1988); *Sorosky v. Burroughs Corp.*, 826 F.2d 794, 798-99 (9th Cir.1987). Our circuit has not adopted this position. We consider the plaintiff's motion to remand sufficient objection to removal to preserve the point for later appeal after final judgment is entered. *Paxton v. Weaver*, 553 F.2d 936, 942 (5th Cir.1977).

endorsed a summary judgment-like procedure for disposing of fraudulent joinder claims. In *B., Inc. v. Miller Brewing Co.*, 663 F.2d 545 (5th Cir.1981), we carefully discussed the procedures for assessing fraudulent joinder claims and noted that "the proceeding appropriate for resolving a claim of fraudulent joinder is similar to that used for ruling on a motion for summary judgment. . . ." *Id.* at 549 n. 9. The *B. Inc.* court expressly authorized consideration of evidence outside of the pleadings:

> In support of their removal petition, the defendants may submit affidavits and deposition transcripts; and in support of their motion for remand, the plaintiff may submit affidavits and deposition transcripts along with the factual allegations contained in the verified complaint.

Id. at 549. Similarly, in *Keating v. Shell Chemical Co.*, 610 F.2d 328 (5th Cir.1980), we approved "piercing the pleadings" to determine controlling state law for purposes of resolving fraudulent joinder questions. We remanded that case for a determination "[b]y summary judgment or otherwise" whether joinder was fraudulent. *Id.* at 333.

[2] In short, this circuit treats fraudulent joinder claims as capable of summary determination. When determining fraudulent joinder, the district court may look to the facts as established by summary judgment evidence as well as the controlling state law. Hence, the trial court properly considered affidavits and depositions in ruling on the plaintiffs' motion to remand. We now turn to the plaintiffs' argument that the district court erred in determining that the non-diverse parties were fraudulently joined.

B.

[3,4] The removing party bears the burden of demonstrating fraudulent joinder. *Laughlin v. Prudential Ins. Co.*, 882 F.2d 187, 190 (5th Cir.1989). The diverse defendants in this case contend that the non-diverse defendants, McInnis and Sizeler, were fraudulently joined because the plaintiff had no possibility of obtaining judgment against them. The standard for judging fraudulent joinder claims of this sort is clearly established in

this circuit: After all disputed questions of fact and all ambiguities in the controlling state law are resolved in favor of the non-removing party, the court determines whether that party has any possibility of recovery against the party whose joinder is questioned. *B., Inc. v. Miller Brewing Co.*, 663 F.2d at 551. We will examine defendants' claim of fraudulent joinder against each non-diverse party in turn.

1. McInnis

[5] The defendants contend that joinder of William McInnis was fraudulent because McInnis, as Samuel Carriere's co-employee, is entitled to tort immunity under the Louisiana workers' compensation scheme. See La.Rev.Stat.Ann. § 23:1032. The plaintiffs argue that McInnis is not entitled to tort immunity because he committed an intentional act. We agree with the district court that the plaintiffs could not possibly recover against McInnis and that McInnis was therefore fraudulently joined.

An intentional act for purposes of Louisiana workers' compensation immunity means an intentional tort. *Bazley v. Tortorich*, 397 So.2d 475, 480 (La.1981). To prove "intent" under Louisiana law, the plaintiff must at least prove that the actor was substantially certain that harmful consequences would result from his conduct. *Mayer v. Valentine Sugars, Inc.*, 444 So.2d 618, 621 (La.1984).

The plaintiffs' original state court petition included an allegation that McInnis was "substantially certain" that his inaction would result in harm to Carriere. But McInnis, in his affidavit, stated that he saw Cariere leave the control room but had no knowledge where Carriere was going or that he was likely to be in danger. In opposition to this affidavit, plaintiffs rely on the affidavit of the police officer who investigated Carriere's murder. According to the officer, McInnis told him after the incident that he "should have" accompanied Carriere to the loading dock.

Construing, as we must, all disputed facts in the plaintiffs' favor, we still find no possibility of recovery by plaintiffs against

McInnis on an intentional tort theory. The officer's affidavit, the only factual support for the plaintiffs' intentional act allegation, shows only that McInnis, after Carriere's tragic murder, wished he had accompanied Carriere to assist him. This is not enough to allow a factfinder to infer that McInnis knew or was substantially certain that harm would befall Carriere. See *Kent v. Joma Products, Inc.*, 542 So.2d 99, 100-01 (La.App. 1st Cir.1989); *Davis v. Southern Louisiana Insulations*, 539 So.2d 922, 924 (La.App.1989).

Thus, viewing the facts most favorably to the plaintiffs, they could not possibly recover from McInnis. We therefore agree with the trial court that McInnis was fraudulently joined.

2. Sizeler

[6] The plaintiffs also sued Sizeler Real Estate Management Company on a theory that Sizeler failed to take reasonable measures to protect Carriere against a threat of criminal harm. Ordinarily, Louisiana law imposes no duty to protect against the criminal acts of third person. *Harris v. Pizza Hut of Louisiana, Inc.*, 455 So.2d 1364, 1371 (La.1984). However, a duty to protect against foreseeable criminal misconduct may arise from a special relationship. For example, an innkeeper may be required, under some circumstances, to take reasonable measures to protect its guests against criminal activity. *Banks v. Hyatt*, 722 F.2d 214 (5th Cir.1984). Likewise, business owners must take reasonable steps to protect those who enter their premises from the foreseeable criminal acts of others. See *Harris*, 455 So.2d at 1369.

The plaintiffs do not argue that a special relationship existed between Sizeler and Sears security employees such as Carriere. However, relying on *Harris v. Pizza Hut, supra*, the plaintiffs contend that because Sizeler guards crossed Sears' property during its patrol, had handled unspecified criminal incidents there, had changed light bulbs on the Sears lot, and had control over the source of power for Sears' parking lot lights, Sizeler assumed a duty to protect Carriere against criminals.

Carriere's reliance on *Harris* is misplaced. In *Harris*, the Louisiana Supreme Court found that Pizza Hut assumed a duty to protect customers on its premises when it provided a security guard. The case before us has none of the features of *Harris*. Sizeler had no relationship, special or otherwise, with Carriere. Carriere was not a Sizeler patron. Carriere was not on Sizeler's "premises" when he was killed, but instead was on Sears' premises, which he had been hired to protect.

Most importantly, in *Harris*, the business owner had taken affirmative action to protect its patrons by hiring a security guard for that purpose. By contrast, the plaintiffs' evidence, viewed as favorably to them as possible, shows only that Sizeler personnel occasionally crossed the Sears parking lot and had some minimal involvement with lighting the entire parking area including that allotted to Sears.

This conduct by Sizeler employees is compatible with its efforts to protect Connecticut General's property as required by Sizeler's contract with Connecticut General. The facts do not support the conclusion that Sizeler assumed a duty to protect Sears property or personnel. See *Kane v. Braquet*, 368 So.2d 1176, 1182 (La.App.), *writ denied*, 369 So.2d 1366 (La.1979)(company did not assume a duty to protect third persons from criminal attack simply by taking security measures solely for its own benefit). The district court correctly concluded that the plaintiff had no possibility of recovering from Sizeler and that Sizeler was therefore fraudulently joined.

III.

Appellants next raise a number of objections to the district court's rulings on appellees' motions for summary judgment.

A.

[7] The plaintiffs first argue that they had inadequate opportunity to conduct discovery before the hearing on the motions for summary judgment filed by Sears and Sizeler. The plaintiffs contend that under Rule 56(f), the district court should have

granted them additional time to complete discovery before the summary judgment hearing. Denial of a continuance under Rule 56(f) is governed by an abuse of discretion standard. *Fontenot v. Upjohn Co.*, 780 F.2d 1190, 1193 (5th Cir.1986). We find no abuse of discretion.

This case was removed to federal court over four months before the hearing on the motions for summary judgment. The record reveals that the plaintiffs took little or no action toward completing discovery during this time.

The plaintiffs did not explain to the district court why they had not completed discovery in the time already allotted. The only justification the plaintiffs offered for an additional delay was that the district court had not yet ruled on the motion to remand. The plaintiffs were not, however, entitled to have the trial judge rule on the motions in any particular order. Therefore, the fact that a motion for remand was pending does not excuse failing to pursue discovery diligently. Under these circumstances, the district court did not abuse its discretion in denying the plaintiffs a further continuance.

B.

[8] Finally, the plaintiffs contend that Sizeler and Connecticut General were not entitled to summary judgment. To uphold a summary judgment, we must find that no genuine issue of material fact remained for trial and that judgment was proper as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986).

Because we have already concluded that Sizeler was fraudulently joined, we need not consider appellant's argument on this point further. Summary judgment will always be appropriate in favor of a defendant against whom there is no possibility of recovery.

We also find that all of the plaintiffs' theories against Connecticut General are deficient. The plaintiffs first argue that Connecticut General could be vicariously liable for Sizeler's

negligence. Since we have already determined that Sizeler owed no duty to Carriere, it is clear that no vicarious liability for Sizeler's fault would flow to Connecticut General.

Plaintiffs next argue that Connecticut General somehow assumed responsibilty for security in the Sears loading area, and thereby assumed a duty to protect Carriere against criminal acts of others. But the plaintiffs offered no summary judgment evidence to support this argument. The available summary judgment evidence refutes this contention.

[9] The plaintiffs' final argument seems to be that as the owner of a business premises, Connecticut General owed a duty to protect Carriere, the security guard on an adjacent premises, from the risk of criminal harm. We have already noted that Louisiana law under some circumstances imposes a duty on owners of business places to protect others against the risk of criminal harm. However, that duty has been extended beyond the actual business premises only in very rare circumstances, and then only when some specific relationship existed between the plaintiff and the defendant. See *Banks v. Hyatt*, 722 F.2d 214 (5th Cir.1984). See also *Weldon v. Great Atlantic & Pacific Tea Co.*, 818 F.2d 459, 461 (5th Cir.1987). Because Carriere was not on the Connecticut General premises when he was attacked, and because no special relationship existed between Carriere and Connecticut General, Connecticut General owed no duty to Carriere. Connecticut General was therefore entitled to judgment in its favor as a matter of law.

AFFIRMED.

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 89-3089

THAIS CARRIERE, Widow of Samuel Carriere, IV, Individually and on Behalf of Her Minor Child, ET. AL.,

Plaintiffs-Appellants,

versus

SEARS, ROEBUCK AND COMPANY, ET. AL.,

Defendants-Appellees

Appeal from the United States District Court for the Eastern District of Louisiana

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ON PETITION FOR REHEARING

(March 2, 1990)

Before DAVIS and SMITH, Circuit Judges, and LITTLE, District Judge.[1]

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

ENTERED FOR THE COURT:

United States Circuit Judge

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[1] District Judge for the Western District of Louisiana, sitting by designation.

MINUTE ENTRY
BEER, J.
JULY 15, 1988

UNITED STAES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

THAIS CARRIERE, ET AL	CIVIL ACTION
VERSUS	NO. 88-974
SEARS, ROEBUCK AND CO., ET AL	SECTION: M

This matter came befor the Court for hearing on July 13, 1988 and was taken under submission. Presently before the Court are the following motions:

1. Plaintiff's motion to remand the case to the Civil District Court, Parish of Orleans, of the State of Louisiana;

2. Defendants', Sizeler Realty Co and Sizeler Real Estate Management Co., Inc., motion for summary judgment;

3. Defendants', Sears, Roebuck and Co. and Connecticut General Life Insurance Co., motion for summary judgment

4. Defendant's, Sears, Roebuck and Co., motion to strike affidavits.

Upon consideration of the memoranda and accompanying documents, as well as, oral arguments of counsel, the Court makes the following findings. The motion to strike affidavits is hereby GRANTED. The motions for summary judgment are hereby GRANTED. The Court finds that the only unresolved matter remaining at this time is the Louisiana State Workman's Compansation claim, which alone, is hereby REMANDED to the Civil District Court, Parish of Orleans, of the State of Louisiana.

/s/Peter Beer

MINUTE ENTRY
BEER, J.
29 AUGUST 1988

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

THAIS CARRIERE, ET AL	CIVIL ACTION
VERSUS	No. 88-0974
SEARS, ROEBUCK AND COMPANY, ET AL	SECTION: M

This matter came before the Court on the motion of plaintiffs for relief from the Minute Entry of July 15, 1988 which struck the plaintiffs' affidavits and granted defendants' motions for summary judgment. Also before the Court is the joint motion of Sears, Roebuck and Company, Sizeler Realty Company, Sizeler Real Estate Managment Company, and Connecticut General Life to amend the Minute Entry of July 15, 1988.

Upon consideration of the legal memoranda submitted, the oral argument of counsel, the record, and the applicable law, the motion of plaintiffs to reconsider the Court's ruling to strike plaintiffs' affidavits and to grant summary judgment in behalf of defendants is DENIED.

The Court does recognize the need to clarify certain matters in the Minute Entry of July 15, 1988. Thus, that Minute Entry is amended to read as follows:

> "Before this Court are the motion filed by plaintiffs to remand this matter the state court, the motion for summary judgment of defendants, Sizeler Realty Company and Sizeler Real Estate Management Company, Inc., the motion for summary judgment filed by Sears, Roebuck and Company, and the Motion urged by Sears, Roebuck and Company to strike the plaintiffs' affidavits.

Upon consideration fo the legal memoranda, the oral argument of counsel, the record, and the applicable law, the motion to remand is DENIED. The motions for summary judgment filed by Sizeler Realty and Sizeler Real Estate Management Company and Sears, Roebuck and Company are GRANTED. The motion to strike the affidavits is GRANTED."

/s/Peter Beer

MINUTE ENTRY
BEER, J.
OCTOBER 24, 1988

UNITED STAES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

THAIS CARRIERE, ET AL	CIVIL ACTION
VERSUS	NO. 88-974
SEARS, ROEBUCK AND CO., ET AL	SECTION: M

Defendants Allstate Insurance Company and William McInnis have noticed for hearing on Wednesday, October 26, 1988 their motion to dismiss. However, these defendants have previously filed this identical motion. *See* Motion to Dismiss William McInnis and Allstate Insurance Company (filed July 29, 1988). On August 24, 1988 at 9:30 a.m., all parties had the opportunity to orally argue the motion. Thereafer, this Court took the matter under consideration. Although the Court in an August 30, 1988 minute entry disposed of other motions heard on August 24th, it did not resolve Allstate and McInnis' motion to dismiss. Because that motion remains under consideration, it is unnecessary for the parties to reargue it. Therefore, oral argument set for October 26th on defendants' renoticed motion is CANCELLED.

/s/Peter Beer

MINUTE ENTRY
BEER, J.
OCTOBER 31, 1988

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA

THAIS CARRIERE, ET AL SAMUEL CARRIER, IV, INDIVIDUALLY AND ON BEHALF OF HER MINOR CHILD, RICHARD DARCEY CARRIER, SAMUEL CARRIERE, V., LEANORA PAIGE CARRIER TOMENY, THAIS MARIE CARRIERE, AND CLAYTON JOSEPH CARRIERE	CIVIL ACTION NO. 88-974
VERSUS	
SEARS ROEBUCK AND COMPANY, SIZELER REALTY CO., CONNECTICUT GENERAL LIFE INSURANCE CO., ON BEHALF OF ITS SEPARATE ACCOUNT R, BILL MCINNIS AND ALLSTATE INSURANCE CO.	 SECTION M

Plaintiffs are the survivors of a security guard who was murdered while on duty at Sears, Roebuck and Co. ("Sears"). The plaintiffs originally filed a damage suit against numerous defendants in Orleans Parish Civil District Court. The defendants then removed the case to the federal court.[1]

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[1] The court denied plaintiffs' Motion to Remand filed March 23, 1988. *See* Minute Entry of July 15, 1988 as amended by Minute Entry of August 29, 1988. In that motion, the plaintiffs maintined that jurisdiction in this court was improper because of the lack of complete diversity. *See* 28 U.S.C. § 1332; *Strawbridge v. Curtiss*, 7 U.S. (3 Cranch) 267 (1806). The Court, however,

(Footnote continued)

This court granted summary judgment in favor of defendants Sizeler Realty Company, Sizeler Real Estate Management Company, Inc., and Sears. *See* Minute Entry of July 15, 1988 as amended by Minute Entry of August 29, 1988. Defendant Allstate Insurance Company's ("Allstate") now moves to dismiss itself and defendant William McInnis from the suit. The court heard oral argument on this motion on August 24, 1988 and took the matter under consideration. Inadvertently, it has remained so until now.[2]

I. *Opinion*

A. *Defendant William McInnis*

Allstate moves under Rule 12(b) to dismiss defendant William McInnis for the plaintiffs' failure to comply with Federal Rule of Civil Procedure 4(j). That rule provides in part as follows:

> If a service of the summons and complaint is not made upon a defendant within 120 days after the filing of the complaint and the party on whose behalf such service was required cannot show good cause why such service was not made within that period, the action ***shall*** be dismissed as to that defendant without prejudice upon the court's own initiative with notice to such party or upon motion.

Fed. R. Civ. P. 4(j) (emnphasis added).

Allstate's motion is meritorious. The plaintiffs filed suit in Orleans Parish Civil District Court on February 3, 1988. The defendants removed to this court on March 7, 1988. As of August

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The court, however, denied plaintiffs' motion because it found that their joinder of defendant McInnis was clearly and convincingly fraudulent. That is, the plaintiffs' claim against McInnis (which defeated complete diversity), was neither based on existing Louisiana law nor in fact. *See Keating v. Shell Chemical Co.*, 610 F.2d 328, 330-32 (5th Cir. 1980).

[2] This court issued a minute entry on August 29, 1988 that disposed of other motions argued on August 24, 1988.

24, 1988, the plaintiffs still had not served defendant McInnis with a summons and complaint. Plaintiffs are clearly delinquent. Moreover, they have not presented "good" reason why this court should excuse their delinquency. *Id.* Therefore, the court must grant defendant Allstate's motion to dismiss defendant William McInnis for noncompliance with Rule 4(j).[3]

B. *Defendant Allstate*

Defendant Allstate also moves for a dismissal under Rule 12. Nevertheless, this court can consider matters outside of the pleadings and treat the Rule 12 motion "as one for summary judgment" since all parties have had a "reasonable opportunity to present all material made pertinent to such a motion by Rule 56." Fed. R. Civ. P. 12(b).

1. *Standard for Summary Judgment*

Federal Rule of Civil Procedure 56(c)[4] governs summary judgment. That rule "mandates the entry of summary judgment,

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[3] Alternatively, the court, finding adequate notice to the defendant William McInnis and to the plaintiffs, dismisses defendant William McInnis on its own motion for the plaintiffs' noncompliance with Rule 4(j). *See* Fed. R. Civ. P. 4(j) ("action shall be dismissed . . . upon the court's own initiative with notice to such party or . . . .").

Despite plaintiffs' contention, *see* Plaintiffs' Second Supplemental Memorandum in Opposition to Allstate's Motion to Dismiss William McInnis and Allstate Insurance Co. at 2, the fact that this court denied plaintiffs' previous Motion to Remand, does not render this motion moot. Perhaps it would have been "neater" had this court dismissed McInnis on its own motion when it denied Plaintiffs' Motion to Remand. However, that this court chose not to do so, does not render the present motion moot. *See Chevron U.S.A., Inc.* v. *Aguilland*, 496 F. Supp. 1038, 1040-42 (M.D. La. 1980) (while the court denied motion to remand because of fraudulent joiner, it did not dismiss the fraudulently joined defendant). To the contrary, it bolsters this court's present dismissal of McInnis.

[4] Rule 56(c) expressly states that summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions of file, together with the affidavits, if any show that there is no genuine issue as to any material fact and that the moving party is entitled to summary judgment as a matter of law." Fed. R. Civ. P. 56(c).

after adequate time for discovery[5] and upon motion, against a party who fails to make a showing sufficient to establish the existence of a [material fact] . . . which that party [must prove] at trial." *Celotex Corp. v. Catrett*, 106 S. Ct. 2548, 2553 (1986) (citing Fed. R. Civ. P. 56(c)).

a. *Materiality.*—The controlling substantive law governs which facts are material. *Anderson v. Liberty Lobby, Inc.*, 106 S.Ct. 2505, 2510 (1986). Only disputes "over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." *Id.* Others are irrelevant.

b. *Genuineness.*—Summary judgment "will not lie if the dispute about a material fact is "genuine." *Id.* The Supreme Court considers a dispute "genuine" if the evidence is such that a reasonable jury could return a verdict on that issue for "either party." *Id.* at 2511.

When, as here, the movant is the defendant,[6] the *movant* initially need only make a " 'showing'—that is, pointing out to the District Court—that there is an *absence of evidence* to support the nonmoving party's [the plaintiff's] case." *Celotex* 106 S.Ct. at 2554 (emphasis added); *see also id.* at 2557 (Brennan, J., dissenting); *Int'l Assoc. of Machinists and Aerospace Workers, AFL-CIO, Lodge No. 2504 v. Intercontinental Manuf. Co.*, 812 F.2d 219, 222 (5th Cir. 1987); *Slaughter v. Allstate Ins. Co.*, 803 F.2d 857, 860 (5th Cir. 1986). However, a "showing" is more than a conclusory allegation; the movant must affirmatively demonstrate the absence of evidence in the record. *Id.* at 2553; *id.* at 2557 (Brennan, J., dissenting). But in no event must the

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[5] If it appears that the nonmoving party is being " 'railroaded' by a premature motion for summary judgment," the court should deny the motion, or continue it until the nonmoving party has adequate opportunity to make full discovery. Fed. R. Civ. P. 56(f); *Celotex Corp. v. Catrett*, 106 S.Ct. 2548, 2554-55 & 2554 n.6 (1986).

[6] Or, more properly, when the movant does *not* bear the burden of proof on that issue at trial.

movant produce affidavits or other new evidence negating the nonmovant's claim. *Id.* at 2553.

If the defendant-movant successfully makes such a "showing," the plaintiff-nonmovant may oppose the motion with any of the kinds of evidence listed in Rule 56(c).[7] *Id.* at 2553-54. The nonmovant need not produce admissible evidence. *Id.* However, the nonmovant must go beyond the pleadings to designate specific disputed facts; the nonmovant must "do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita*, 106 S. Ct. at 1356. If the plaintiff fails to do so, the court must grant summary judgment.

If the plaintiff-nonmovant *does* make the requisite "showing," however, the court then must decide by a preponderance whether summary judgment is appropriate. The *defendant-movant* has the burden of proving that there is no genuine issue of fact, *Anderson*, 106 S. Ct. at 2514, and that it is entitled to judgment as a matter of law. *Id.*; *see also Williams v. Adames*, 836 F.2d 958, 960 (5th Cir. 1988); *Thomas v. Harris County*, 784 F.2d 648, 651 (5th Cir. 1986).

2. *Summary Judgment Standard Applied*

a. *Materiality.*—Whether Allstate insured McInnis is clearly a material issue. That is, it is a fact that will "affect the outcome of the [plaintiffs'] suit [against Allstate] under [Louisiana] law. . . ." *See Anderson*, 106 S. Ct. at 2510.

b. Genuineness.—Allstate has submitted affidavits showing that it was not the insurer of William McInnis for the liability asserted in this suit. The plaintiffs have submitted no contrary evidence to create a material issue of fact regarding insurance coverage. Because the plaintiffs have had adequate time to conduct discovery, *see* Fed. R. Civ. P. 56(f), Allstate is entitled to summary judgment.[8]

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[7] *See supra* note 4.

[8] Alternatively, Allstate's liability is derivative and dependent upon the plaintiffs' claims against McInnis. However, those claims are baseless. *See supra* note 1. Because the court has previously dismissed the plaintiffs' claims against McInnis, Allstate is entitled to summary judgment.

II. *Order*

After considering the memoranda submitted by counsel, their oral arguments, the record, and the applicable law, IT IS ORDERED that defendant William McInnis is DISMISSED. IT IS FURTHER ORDERED, ADJUDGED AND DECREED that summary judgment is GRANTED in favor of defendant Allstate.

/s/Peter Beer

Peter Beer
United States District Judge

MINUTE ENTRY
BEER, J.
12/20/88

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA

THAIS CARRIERE, WIDOW OF SAMUEL CARRIER, IV, INDIVIDUALLY AND ON BEHALF OF HER MINOR CHILD, RICHARD DARCEY CARRIER, SAMUEL CARRIERE, V., LEANORA PAIGE CARRIER TOMENY, THAIS MARIE CARRIERE, AND CLAYTON JOSEPH CARRIERE — CIVIL ACTION

NO. 88-974

VERSUS

SEARS ROEBUCK AND COMPANY SIZELER REALTY CO., CONNECTICUT GENERAL LIFE INSURANCE CO., ON BEHALF OF ITS SEPARATE ACCOUNT R, BILL MCINNIS AND ALLSTATE INSURANCE CO.

SECTION M

OPINION AND ORDER

I. *Background*

A. *Procedural Posture*

The court originally heard oral arguments on this motion on November 16, 1988. At that time, the court continued the motion until Decemebr 14, 1988 so that the plaintiffs could conduct additional discovery.

B. *Facts*

Plaintiffs are the survivors of a security guard who was murdered while on duty at Sears, Roebuck & Co. ("Sears"). The

plaintiffs originally filed a damage suit against numerous defendants in Orleans Parish Civil District Court. The defendants then removed he case to this court.[1]

This court previously granted summary judgment in favor of the following defendants: (1) Sears, (2) Sizeler Realty Company, (3) Sizeler Real Estate Management Company, Inc.,[2] and (4) Allstate Insurance Company.[3] The court also dismissed defendant William McInnis for improper service of process.[4] The only defendant that remains is the owner of the Plaza Shopping Center, Connecticut General Insurance Company ("Connecticut General"). It now moves for summary judgment.

C. *The Present Motion*

1. *Defendant-Movant's Position.* – Connecticut General argues that it is neither responsible (1) for providing security on Sears' property, nor (2) for "controlling the work environment of Sears' employee, Samuel Carriere." Connecticut General's Memorandum in Support of Summary Judgment at 3 [hereinafter Defendant's Memo]. In short, Connecticut General argues that it neither owned the property on which Carriere was murdered, nor was responsible for security or lighting on the property.

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[1] The court denied plaintiffs' Motion to Remand filed March 23, 1988. *See* Minute Entry of July 15, 1988 as amended by Minute Entry of August 29, 1988. In that motion, the plaintiffs maintained that jurisdiction in this court was improper because of the lack of complete diversity. *See* 28 U.S.C. § 1332; *Strawbridge v. Curtiss*, 7 U.S. (3 Cranch) 267 (1806). The court, however, denied plaintiffs' motion because it found that their joinder of defendant McInnis was clearly and convincingly fraudulent. That is, the plaintiffs' claim against McInnis (which defeated complete diversity), was neither based on existing Louisiana law nor in fact. *See Keating v. Shell Chemical Co.*, 610 F. 2d 328, 330-32 (5th Cir. 1980).

[2] *See* Minute Entry of July 15, 1988 as amended by Minute Entry of August 29, 1988.

[3] *See* Minute Entry of October 31, 1988.

[4] *Id.*

2. *Plaintiff's Opposition.* — The plaintiffs counterargue that summary judgment is improper because there remain unresolved disputes over material facts. Namely, they assert that Connecticut General had assumed the responsibility for lighting and patrolling the Sears parking lot. To support this contention, the plaintiffs submit the affidavits of two individuals who attest that they have seen Sizeler personnel working in the Sears parking area. They also submit deposition testimony purportedly suggesting that Connecticut General had assumed the responsibility for security and lighting at the Sears facility.

II. *Opinion*

A. *Standard for Summary Judgment*

Federal Rule of Civil Procedure 56(c)[5] governs summary judgment. This rule "mandates the entry of summary judgment, after adequate time for discovery[6] and upon motion, against a party who fails to make a showing sufficient to establish the existence of a [material fact] . . . which that party [must prove] at trial." *Celotex Corp. v. Catrett*, 106 S. Ct. 2548, 2553 (1986) (citing Fed. R. Civ. P. 56(c)).

1. *Materiality* — The controlling substantive law governs which facts are material. *Anderson v. Liberty Lobby, Inc.*, 106 S. Ct. 2505, 2510 (1986). Only disputes "over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." *Id.* Others are irrelevant.

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[5] Rule 56(c) expressly states that summary judgment is proper "if the pleading, depositions, answers to interrogatories, and admissions of file, together with the affidavits, if any show that there is no genuine issue as to any material fact and that the moving party is entitled to summary judgment as a matter of low." Fed. R. Civ. p. 56(c).

[6] If it appears that the nonmoving party is being " 'railroaded' by a premature motion for summary judgment," the court should deny the motion, or continue it until the nonmoving party has adequate opportunity to make full discovery. Fed. R. Civ. P. 56(f); *Celotex Corp. v. Catrett*, 106 S.Ct. 2548, 2554-55 & 2554 n. 6 (1986).

2. *Genuineness.* – Summary jugdment "will not lie if the dispute about a material fact is "genuine." *Id.* The Supreme Court considers a dispute "genuine" if the evidence is such that a reasonable jury could return a verdict on that issue for "either party." *Id.* at 2511.

When, as here, the movant is the defendant,[7] the *movant* initially need only make a " 'showing' – that is, pointing out to the District Court – that there is an *absence of evidence* to support the nonmoving party's [the plaintiff's] case." *Celotex* 106 S. Ct. at 2554 (emphasis added); *see also id.* at 2557 (Brennan, J., dissenting); *Int'l Assoc. of Machinists and Aerospace Workers, AFL-CIO, Lodge No. 2504 v. Intercontinental Manuf. Co.*, 812 F.2d 219, 222 (5th Cir. 1987); *Slaughter v. Allstate Ins. Co.*, 803 F.2d 857, 860 (5th Cir. 1986). However a "showing" is more than a conclusory allegation; the movant must affirmatively demonstrate the absence of evidence in the record. *Id.* 2553; *id.* at 2557 (Brennan, J., dissenting). But in no event must the movant produce affidavits or other new evidence negating the nonmovant's claim. *Id.* at 2553.

If the defendant-movant successfully makes such a "showing," the plaintiff-nonmovant may oppose the motion with any of the kinds of evidence listed in Rule 56(c).[8] *Id.* at 2553-54. The nonmovant need not produce admissible evidence. *Id.* However, the nonmovant must go beyond the pleadings to designate specific disputed facts; the nonmovant must "do more than simply show there is some metaphysical doubt as to the material facts." *Matsushita,* 106 S. Ct. at 1356. If the plaintiff fails to do so, the court must grant summary judgment.

If the plaintiff-nonmovant *does* make the requisite "showing," however, the court then must decide by a preponderance whether summary judgement is appropriate. The *defendant-movant* has

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[7] Or, more properly, when the movant does *not* bear the burden of proof on that issue at trial.

[8] *See supra* note 1.

the burden of proving that there is no genuine issue of fact, *Anderson*, 106 S. Ct. at 2514, and that it is entitled to jugement as a matter of law. *Id.; see also Williams v. Adames*, 836 F. 2d 958, 960 (5th Cir. 1988); *Thomas v. Harris County*, 784 F.2d 648, 651 (5th Cir. 1986).

B. *Summary Judgement Standard Applied*

1. *Materiality.*—In order to recover from Connecticut General under Louisiana law, plaintiffs must prove either of the following: (1) that Connecticut General was the owner of the property on which Mr. Carrier was murdered, *see, e.g., Landry v. St. Charles Inn., Inc.*, 446 So. 2d 1246 (La. Ct. App. 4th Cir. 1986); *Banks v. Hyatt Corporation*, 722 F.2d 214 (5th Cir. 1984), or alternatively, (2) that Connecticut General (or its agent Sizeler), was contractually responsible to Sears for security and lighting at the sight of the murder, *see Washington v. Degelos*, 312 So. 2d 918 (La. Ct. App. 1975). These facts are material because they will "affect the outcome of the [plaintiffs'] suit [against Connecticut General] under [Louisiana] law . . . ." *Anderson*, 106 S. Ct. at 2510.

2. *Genuineness.*—Connecitcut General has submitted evidence indicating that it is not the owner of the property upon which Mr. Carriere was murdered. The plaintiffs have submitted no contrary evidence. Therefore, there exists no genuine issue of fact regarding ownership. Connecticut General would be entitled to summary judgment on this issue alone. However, because plaintiffs have alleged an alternative basis of liability, the court must look to the genuineness of the issues underlying that claim.

Connecticut General maintains that there is no evidence in the record suggesting that it (or its agent Sizeler) ever contracted with Sears to provide security servies. This "showing" is sufficient to shift the burden of production to the plaintiff. *See Celotex*, 106 S. Ct. at 2554.

Plaintiff counters with affidavits and deposition testimony purportedly inferring that Connecticut General agents were

contractually responsible for securing and lighting the Sears parking lot prior to Mr. Carriere's death. Plaintiff further maintains that these affidavits and depositions suggest that Connecticut General had actually assumed such security responsibilities.

The court finds, however, that this evidence is insufficient to raise an inference that genuine disputes remain. Connecticut General has, therefore, carried its burden or proving (1) that there is no genuine issue of fact, and (2) that it is entitled to summary judgment as a matter of law. *Id.* at 2514. Accordingly, the court must grant the defendant's summary judgement motion.

III. *Order*

After considering the record, the memoranda submitted by counsel, and the applicable law, defendant Connecticut General's Motion for Summary Judgement is **GRANTED**. Connecitcut General is **ORDERED** to prepare and submit a judgment consistent with this minute entry.

/s/ Peter Beer

Peter Beer
United States District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

THAIS CARRIERE, WIDOW OF SAMUEL CARRIERE, IV, individually and on behalf of her minor child, RICHARD DARCEY CARRIER, SAMUEL CARRIERE, V, LEANORA PAIGE CARRIER TOMENY, THAIS MARIE CARRIERE, AND CLAYTON JOSEPH CARRIERE	* CIVIL ACTION * NO. 88-0974 * SECTION "M" * MAG. DIV. (6)
VERSUS	*
SEARS ROEBUCK AND COMPANY SIZELER REALTY CO., CONNECTICUT GENERAL LIFE INSURANCE CO., ON BEHALF OF ITS SEPARATE ACCOUNT R, BILL MCCINNIS AND ALLSTATE INSURANCE COMPANY	*

* * * * * * * * * *

JUDGMENT ON MOTION FOR SUMMARY JUDGMENT OF CONNECTICUT GENERAL LIFE INSURANCE COMPANY

Considering the motion for summary judgment of defendant, Connecticut General Life Insurance Company, the record, the memoranda submitted by counsel and the applicable law, and being of the opinion that there are no genuine issues of material fact and that defendant, Connecticut General Life Insurance Company, is entitled to summary judgment as a matter of law pursuant to Federal Rule of Civil Procedure 56 for the reasons set forth in the minute entry herein, dated December 20, 1988;

IT IS ORDERED that the plaintiffs' complaint and all claims asserted therein against defendant, Connecticut General Life Insurance Company, are dismissed, with prejudice, at plaintiffs' costs.

New Orleans, Louisiana, this 6th day of January 1989.

UNITED STATES DISTRICT JUDGE

Respectfully submitted,

MONTGOMERY, BARNETT, BROWN,
READ, HAMMOND & MINTZ

BY: _____

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CERTIFICATE OF SERVICE

I do hereby certify that on this 6th day of January, 1989, I served a copy of the foregoing pleading on counsel for all parties to this proceeding by mailing same by first class United States mail, postage prepaid and properly addressed.

ROBERT E. DURGIN

REDI-4.4

NO. 89-1885

In the Supreme Court of the United States

October Term, 1989

THAIS CARRIERE, INDIVIDUALLY AND ON BEHALF OF RICHARD DARCEY CARRIERE, SAMUEL CARRIERE, V, LEANORA PAIGE CARRIERE TOMENY, THAIS MARIE CARRIERE AND CLAYTON JOSEPH CARRIERE,

Petitioners,

vs.

SEARS, ROEBUCK & COMPANY, SIZELER REALTY COMPANY, SIZELER REAL ESTATE MANAGEMENT COMPANY, INC., CONNECTICUT GENERAL LIFE INSURANCE COMPANY, ON BEHALF OF ITS SEPARATE ACCOUNT R, WILLIAM McINNIS AND ALLSTATE INSURANCE COMPANY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

TERRY J. FREIBERGER*
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QUESTIONS PRESENTED

I.

Do the Federal Rules of Civil Procedure prohibit the contemporaneous hearing of a motion to remand and non-diverse defendants' motions for summary judgment?

II.

Have petitioners presented sufficient grounds for the reversal of the lower courts' interpretation of Louisiana law?

INTERESTED PARTIES

The following list of all parent and nonwholly owned subsidiaries of respondents, Sizler Realty Company, Inc. and Connecticut General Life Insurance Company, on behalf of its Separate Account R, is provided pursuant to Supreme Court Rule 29.1:

Westminster Assets Co., Inc.
Connecticut General Corporation
CIGNA Holdings Inc.
CIGNA Corporation
Greenspoint Marriott Restaurant Corporation
North Coast Investment Corporation
PCGP, Inc.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i
INTERESTED PARTIES ii
TABLE OF CONTENTS iii
TABLE OF AUTHORITIES iv
OPINIONS BELOW 2
RULES INVOLVED 2
STATEMENT OF THE CASE 2
SUMMARY OF THE ARGUMENT 5
ARGUMENT 6
I. Petitioners Could Not Waive An Objection To Subject Matter Jurisdiction 6
II. The District Court's Proceedings Were Perfectly Appropriate 9
III. Louisiana Law Was Correctly Applied 11
IV. Petitioners' Rhetoric Distorts The Applicable Legal Precepts 13
CONCLUSION 16

TABLE OF AUTHORITIES

Cases	Page
B, Inc. v. Miller Brewing Co., 663 F.2d 545 (5th Cir. 1981)	11
Banks v. Hyatt Corporation, 722 F.2d 214 (5th Cir. 1984)	12
Bender v. Williamsport Area School District, 475 U.S. 534, 106 S.Ct. 1326, 89 L.Ed.2d 501 (1986)	6
Carriere v. Sears, Roebuck & Company, 893 F.2d 98 (5th Cir. 1990)	5,12,13
Celotex Corporation v. Catrett, 477 U.S. 317, 106 S.Ct 2458, 91 L.Ed.2d 265 (1986)	14,15
Commercial Associates v. Tilcon Gammino, Inc., 670 F.Supp. 461 (D.R.I. 1987)	7,8
Fristoe v. Reynolds Metal Co., 615 F.2d 1209 (9th Cir. 1980)	7,9
Harris v. Edward Hyman Co., 664 F.2d 943 (5th Cir. 1981)	7
Harris v. Pizza Hut, Inc., 455 So.2d 1364 (La. 1984)	12
Johnson v. Odeco Oil & Gas Co., Inc., 679 F.Supp. 604 (E.D.La. 1987)	7,8,9
Keating v. Shell Oil Co., 610 F.2d 328 (5th Cir. 1980)	11
McKay v. Boyd Construction Co., Inc. 769 F.2d 1084 (5th Cir. 1985)	8
Roberts v. Vulcan Material Company, 558 F.Supp. 108 (M.D.La. 1983)	7,9
Smith v. Walgreens Louisiana Co., Inc., 542 So.2d 766 (La. App. 4th Cir. 1989)	12
Wade v. Fireman's Fund Insurance Company, 716 F.Supp. 226 (M.D.La. 1989)	7,8,9
Willie v. American Casualty Co., 547 So.2d 1075 (La. App. 1st Cir. 1989)	12,13

TABLE OF AUTHORITIES (continued)

Statutes and Rules

	Page
28 U.S.C. §1441	8
Sup. Ct. R. 15.1	7
Fed. R. Civ. Pro. 1	2,15
Fed. R. Civ. Pro. 56(c)	15

No. 89-1885

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1989

THAIS CARRIERE, INDIVIDUALLY AND ON BEHALF OF RICHARD DARCEY CARRIERE, SAMUEL CARRIERE, V, LEANORA PAIGE CARRIERE TOMENY, THAIS MARIE CARRIERE AND CLAYTON JOSEPH CARRIERE,

Petitioners,

vs.

SEARS, ROEBUCK & COMPANY, SIZELER REALTY COMPANY, SIZELER REAL ESTATE MANAGEMENT COMPANY, INC., CONNECTICUT GENERAL LIFE INSURANCE COMPANY, ON BEHALF OF ITS SEPARATE ACCOUNT R, WILLIAM McINNIS AND ALLSTATE INSURANCE COMPANY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

Respondents, Sizeler Realty Co., Inc., Sizeler Real Estate Management Co., Inc. and Connecticut General Life Insurance Company, on behalf of its Separate Account R, respectfully pray that the Petition for a Writ of Certiorari

to the United States Court of Appeals for the Fifth Circuit be denied.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 893 F.2d 98 (5th Cir. 1990).

RULES INVOLVED

Fed. R. Civ. Pro. 1 provides:

RULE 1. Scope of Rules

> These rules govern the procedure in the United States district courts in all suits of a civil nature whether cognizable as cases at law or in equity or in admiralty, with the exceptions stated in Rule 81. *They shall be construed to secure the just, speedy, and inexpensive determination of every action.* (emphasis added).

STATEMENT OF THE CASE

Petitioners filed a meritless lawsuit in a Louisiana state court on January 28, 1988, fraudulently joining two nondiverse defendants. After removal to the United States District Court for the Eastern District of Louisiana, that court correctly applied federal procedural and Louisiana substantive law to retain jurisdiction and dismiss petitioners' ill-founded claims. The Fifth Circuit affirmed and denied petitioners' petition for rehearing. Petitioners' reasons for why this Honorable Court should review the lower courts' judgments are equally meritless. Petitioners' collage of factual misstatements, procedural distortions

and legal rhetoric are inadequate to warrant further review.

Despite a predominantly procedural argument, petitioners inaccurately recite the lawsuit's procedural history. Many procedural distortions arise from petitioners' collective reference to the respondents, Sizeler Real Estate Management Co., Inc.[1] and Sizeler Realty Co., Inc.[2], as "Sizeler Interests." This collective reference masks significant procedural developments. Petitioners did not file "a petition for damages in the state court in New Orleans, Louisiana against Sizeler Interests." (Petition at 3). Petitioners' state court petition only named *Sizeler Realty*, a Louisiana corporation whose contractual relationship with The Plaza in Lake Forest Shopping Center[3] was completely severed over a month before the death which gave rise to this lawsuit, as defendant. *Sizeler Real Estate* was not a party when the action was removed to federal court. Only Sizeler Realty — not both "Sizeler Interests" — was a party to this suit at the time of petitioners' remand motion. Sizeler Real Estate was not a party to the April 12, 1988 opposition memorandum to petitioners' remand motion. Sizeler Real Estate was named defendant *on April 26, 1988* in an attempt to cure petitioners' improper joinder of Sizeler Realty.

Petitioners also misstate the time period between initial raising of the fraudulent joinder issue and the hearing of the remand motion. Petitioners inaccurately state that their motion to remand was heard "approximately six weeks" after fraudulent joinder was first pled. (Petition at

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1. Hereinafter "Sizeler Real Estate."

2. Hereinafter "Sizeler Realty."

3. Hereinafter "the Lake Forest Shopping Center."

4). In fact, over four months passed between these events.[4] The removal petition alleging fraudulent joinder was filed by respondents, Sears, Roebuck and Company[5], Allstate Insurance Company and Sizeler Realty, *on March 7, 1988.* Petitioners' motion to remand was heard *on July 13, 1988.*

Petitioners' omission of all proceedings between April 12, 1988 and May 25, 1988 significantly distorts the proceedings below. During this time frame petitioners moved for continuance of the scheduled hearing of their remand motion on the grounds that respondents' opposition memoranda were *"in the nature of a motion for summary judgment."* (Petitioners' Motion to Continue Hearing on Plaintiffs' Motion to Remand, p. 2; emphasis added). After the hearing was re-set for June 1, 1988, respondents, Sizeler Real Estate, Sizeler Realty and Connecticut General Life Insurance Company, on behalf of its Separate Account R,[6] moved for a second continuance. Respondents' motion advised the court and petitioners that a summary judgment motion was forthcoming and requested contemporaneous hearing of the remand and summary judgment motions. *Petitioners did not oppose this motion.*

Petitioners also misrepresent the proceedings by omitting any reference to the discovery conducted to oppose Connecticut General's motion for summary judgment. In November 1988, petitioners deposed John Hance, one of Carriere's co-workers, and Joel Jacobs, Sizeler Real

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4. Petitioners' computation of the time period "from start to end" of the lawsuit is also wrong. (Petition at 6). Suit was filed on January 28, 1988. The district court entered final judgment on January 11, 1989, not "one hundred sixty-nine days" later. (Petition at 5, 6).

5. Hereinafter "Sears."

6. Hereinafter "Connecticut General."

Estate's Senior Vice-President and Director of Property Management. These depositions confirmed the absence of liability on behalf of Sizeler Realty, Sizeler Real Estate and Connecticut General. Based on the facts disclosed in these depositions, the district court granted summary judgment to Connecticut General, a party whom petitioners alleged was *vicariously* liable for the acts of the previously-dismissed Sizeler Real Estate and Sizeler Realty.

Petitioners also misstate one of the most important substantive facts of the case — the location of the decedent's death. The Lake Forest Shopping Center is comprised of several distinct, separately owned, properties including parcels of real estate owned by respondents, Sears and Connecticut General. *Carriere v. Sears, Roebuck & Company*, 893 F.2d 98, 99 (5th Cir. 1990). Petitioners' decedent, a Sears security guard, was killed on the parcel owned by Sears. Despite the importance of this fact under Louisiana law, petitioners represent that Connecticut General owned "the shopping mall where the Sears store was located." (Petition at 3). This ambiguous sentence misleads an unknowing reader into believing that Connecticut General owned the property where the death occurred. Connecticut General did not own that property. Petitioners' inaccurate and, at best, inartful phrasing of this sentence distorts a critical fact underlying the lower courts' judgments.

SUMMARY OF THE ARGUMENT

Petitioners do not claim that the Fifth Circuit's decision conflicts with any precedent of this Honorable Court or any other federal appellate court, nor do they claim that it violates any constitutional provision or misinterprets any federal statute. Petitioners only claim that the Fifth Circuit departed from its own precedents when construing the Federal Rules of Civil Procedure.

Petitioners' contention that the decisions below misapplied the Federal Rules of Civil Procedure rests on the faulty premise that petitioners could have waived an objection to federal subject matter jurisdiction. All the cases cited by petitioners are distinguishable. None support petitioners' proposition that a jurisdictional objection is waived by conducting discovery. The lower courts correctly construed and applied the Federal Rules of Civil Procedure.

Respondents owed no duty under Louisiana law to protect petitioners' decedent against criminal assaults. The federal courts sitting in Louisiana correctly applied Louisiana law.

Petitioners provide no adequate grounds for further review.

ARGUMENT

I. Petitioners Could Not Waive An Objection To Subject Matter Jurisdiction.

Petitioners attempt to conceal the substantive deficiencies of their claims by conjuring a procedural "dilemma." Petitioners' argument for review rests on the faulty premise that they could somehow have waived an objection to subject matter jurisdiction.[7] Petitioners fear a figment of their own imagination. Whether nondiverse defendants are "fraudulently joined" determines the existence of federal diversity jurisdiction. Litigants may not confer subject matter jurisdiction upon a federal court by failing to object. *Bender v. Williamsport Area School District,*

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7. Notably, petitioners' appellate brief did not argue this issue to the Fifth Circuit.

475 U.S. 534, 106 S.Ct. 1326, 89 L.Ed.2d 501 (1986). Even if the litigants concede jurisdiction, every federal appellate court is obliged to satisfy itself of the existence of federal jurisdiction. 475 U.S. at 541. The federal courts, at all levels, have the power to notice the absence of subject matter jurisdiction *sua sponte*. Rule 15.1 of this Court acknowledges that litigants cannot waive objections to subject matter jurisdiction:

> Any defect of this sort in the proceedings below *that does not go to jurisdiction* may be deemed waived if not called to the attention of the Court by the respondent in the brief in opposition. S. Ct. R. 15.1; (emphasis added).

Like Don Quixote jousting with windmills, petitioners perceive a non-existent danger. Petitioners would not have waived their jurisdictional objection by conducting discovery.

Petitioners' citations undermine their own contentions. The rulings in *Harris v. Edward Hyman Co.*, 664 F.2d 943 (5th Cir. 1981); *McKay v. Boyd Construction Co, Inc.*, 769 F.2d 1084 (5th Cir. 1985); *Johnson v. Odeco Oil & Gas Co., Inc.*, 679 F.Supp. 604 (E.D.La. 1987); *Wade v. Fireman's Fund Insurance Company*, 716 F.Supp. 226 (M.D.La. 1989); *Roberts v. Vulcan Material Company*, 558 F.Supp. 108 (M.D.La. 1983); *Fristoe v. Reynolds Metal Co.*, 615 F.2d 1209 (9th Cir. 1980); and, *Commercial Associates v. Tilcon Gammino, Inc.*, 670 F.Supp. 461 (D.R.I. 1987), do not stand for the proposition that petitioners would have waived a jurisdictional objection by conducting discovery. These cases are procedurally distinguishable in two respects: 1) the cases finding "waiver" are limited to *technical defects* in removal, not subject matter jurisdiction; and, 2) none involve plaintiffs who had filed a motion

to remand *before* conducting discovery. These cases only highlight the fallacy of petitioners' argument.

McKay, 769 F.2d at 1084, cited and quoted by petitioners, subverts their own position. (Petition at 12). The issue of federal jurisdiction was first raised *on appeal* in *McKay*. After finding that the Eleventh Amendment barred the plaintiffs' federal claim against the Mississippi State Highway Department, *the Fifth Circuit remanded the entire case to state court. McKay* did not rule that the Mississippi State Highway Department waived its objection to federal jurisdiction. The language cited by petitioners highlights the distinction between objections to jurisdiction and technical defects in removal. The defect that the Fifth Circuit described, in *dicta*, as "waived" was 28 U.S.C. §1441's technical limitation prohibiting the removal of an action in which any defendant is citizen of the forum state. *McKay*, 769 F.2d at 1087. An objection on this grounds does not address itself to subject matter jurisdiction, only to compliance with Section 1441's technical requirements for removal. *McKay* does not support petitioners' fear of "waiver."

Petitioners' remaining cases are similarly distinguishable. *Commercial Associates*, 670 F.Supp. at 463, involved the same technical defect as *McKay*, 769 F.2d at 1084. The *Harris*, 664 F.2d at 943, and *Wade*, 716 F.Supp. at 226, removal petitions were *technically defective* because all defendants did not timely consent to removal. In *Roberts*, 558 F.Supp. at 108, one defendant's citizenship was not alleged in the removal petition and had not joined in the removal. The *Fristoe*, 615 F.2d at 1209, removal was untimely. *Johnson*, 679 F.Supp. at 604, was an improperly removed Jones Act suit. None of petitioners' cases find a waiver of jurisdictional objections. None

suggest that petitioners would have waived an objection to federal jurisdiction by conducting discovery in an effort to oppose respondents' motions for summary judgment.

Petitioners' cases are also distinguishable based on the timing of the remand motions. Petitioners timely objected to removal by filing their motion to remand sixteen days later. None of the petitioners' cases involve a timely objection to removal. In *Wade*, 716 F.Supp. at 227-228, and *Roberts*, 558 F.Supp. at 108, *the courts*, not the plaintiffs, noticed the procedural defects in removal. In *Fristoe*, 615 F.2d at 1212, the plaintiff did not raise a technical defect in removal until the case was on appeal. The *Johnson* plaintiff waited almost a year after removal and participated in discovery before seeking remand. *Johnson*, 679 F.Supp. at 605-606. None of the remaining cases involved a plaintiff who had moved to remand before participating in discovery. Thus, even were it possible for petitioners to waive a jurisdictional objection, the cited cases do not support a finding of waiver under the present circumstances. The foundation for petitioners' perceived "irreconcilable dilemma" does not exist.

II. The District Court's Proceedings Were Perfectly Appropriate.

Petitioners' actions prior to the July 13, 1988 hearing highlight the propriety of the proceedings in the district court. The hearing of petitioners' remand motion was originally set for April 21, 1988. Petitioners moved for a continuance on the grounds that respondents' opposition memoranda "were in the nature of a motion for summary judgment." The district court continued the hearing until June 1, 1988. Since Sizeler Realty and Sizeler Real Estate were nondiverse defendants and a primary issue at the re-

mand hearing would be whether they had been fraudulently joined, these parties moved for a second continuance on May 17, 1988. Respondents' motion recited that they would be filing motions for summary judgment and that judicial economy dictated contemporaneous hearing of the summary judgment and remand motions. *Petitioners did not oppose respondents' continuance motion nor object to respondents' request that the motions be heard contemporaneously.*[8] After the summary judgment motions were filed, Sizeler Realty and Sizeler Real Estate moved for leave that their memorandum supporting the summary judgment motions also be considered a supplemental opposition memorandum to petitioners' remand motion.[9] *Petitioners did not oppose respondents' motion that the memorandum be considered on both motions.* Petitioners' acquiescence in these proceedings arose from their recognition that the district court could properly hear a remand motion and nondiverse defendants' motions for summary judgment contemporaneously.

Petitioners' tardy objection to this procedure is somewhat confusing. *Petitioners concede that the district court properly considered matters outside of the pleadings,* the respondents' affidavits and documentary evidence, when deciding the motion to remand. (Petition at 8). Petitioners do not expressly complain of the standard applied by the district court when deciding the motion to remand. Petitioners only contend that the Fifth Circuit "distorted its own precedent" by permitting the remand and sum-

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8. On July 6, 1988, a week before the hearing, petitioners belatedly argued that the two hearings should be separate in a memorandum supporting a motion to continue the summary judgment hearing.

9. Connecticut General, a diverse defendant only alleged to be *vicariously* liable for the acts of Sizeler Realty and Sizeler Real Estate, did not move for summary judgment at this time because its citizenship was not at issue in the jurisdictional motion.

mary judgment motions to be orally argued at one hearing. (Petition at 6). The gravamen of this contention is that the summary judgment motion somehow improperly influenced the district court's consideration of the remand motion. No federal statute or procedural rule prohibits federal district courts from entertaining both motions at one hearing. No case law so restricts the discretion of the federal judiciary. One must ask: Do petitioners suggest that that a different result should obtain if the remand motion were heard at 9:00 a.m. and the summary judgment motions at 10:00 a.m.?

Petitioners do not claim that the Fifth Circuit's decision conflicts with any precedent of this Honorable Court. Neither do they claim that the Fifth Circuit's opinion conflicts with any decision of another federal appellate court. They do not argue any constitutional violations nor any misinterpretations of federal statutes. Petitioners only complain that the Fifth Circuit misinterpreted its own precedents. The Fifth Circuit opinions in *B, Inc. v. Miller Brewing Co.*, 663 F.2d 545 (5th Cir. 1981), and *Keating v. Shell Oil Co.*, 610 F.2d 328 (5th Cir. 1980), were extensively briefed and orally argued before the Fifth Circuit. The litigants highlighted the language in those decisions which favored their contentions. The Fifth Circuit considered those contentions and explained its prior precedents. Dissatisfied with the Fifth Circuit's explanation of its previous opinions, petitioners again pick and choose quotations from three Fifth Circuit opinions. Petitioners, not the Fifth Circuit, distort the rulings of that court. Petitioners' distortions do not warrant review by this Court.

III. Louisiana Law Was Correctly Applied.

Petitioners also request this Court to review the lower courts' application of Louisiana law. The United

States District Court for the Eastern District of Louisiana is located at 500 Camp Street, New Orleans, *Louisiana*. The United States Court of Appeals for the Fifth Circuit is located at 600 Camp Street, New Orleans, *Louisiana*. The Louisiana Supreme Court is within walking distance of the two federal courts. The lower courts which decided this case routinely consider questions of Louisiana law.

Petitioners' request is particularly unpersuasive in this case. The Fifth Circuit's decision in *Banks v. Hyatt Corporation*, 722 F.2d 214 (5th Cir. 1984), is an authoritative analysis of the Louisiana legal principles applicable to the present facts. The only Louisiana Supreme Court opinion cited in support of petitioners' argument that Sizeler Real Estate and Sizeler Realty were not fraudulently joined, *Harris v. Pizza Hut, Inc.*, 455 So.2d 1364 (La. 1984), directly relied on the Fifth Circuit's interpretation of Louisiana law in *Banks*. In disputing the Fifth Circuit's resolution of an issue on which the Louisiana Supreme Court has acknowledged its competency, petitioners ignore two critical facts: 1) petitioners' decedent was murdered on property that was not managed by Sizeler Real Estate or Sizeler Realty; and, 2) petitioners' decedent had no relationship to either Sizeler Realty or Sizeler Real Estate. *Carriere was employed as a Sears' security guard protecting Sears' property at the time of the murder.* The flaw in petitioners' case has always been that they have asked the courts to find that Sizeler Realty and Sizeler Real Estate owed a duty to protect an adjacent property owner's security guard. No such duty exists under Louisiana law.

The cases cited by petitioners, *Willie v. American Casualty Co.*, 547 So.2d 1075 (La. App. 1st Cir. 1989), and *Smith v. Walgreens Louisiana Co., Inc.*, 542 So.2d 766 (La. App. 4th Cir. 1989), do not create such a duty. *Willie* and

Smith are factually distinguishable because the plaintiffs were assaulted on the defendants' properties.

Petitioners argue that *Willie*, 547 So.2d at 1075, and *Smith*, 542 So.2d at 766, expand the class of persons to whom commercial establishments owe a duty of protection. This alleged expansion does not encompass the petitioners' decedent. Neither *Smith* nor *Willie* expanded that duty to persons who were not on the defendants' premises. Petitioners' discussion of this issue disputes — for the first time — the relationship between Carriere and respondents. (Petition at 20). The relationship between these parties was never "in dispute" in the lower courts. *Carriere*, 893 F.2d at 101. This issue cannot be disputed because the only relationship which existed was the employer/employee relationship between Carriere *and Sears*. Carriere had no relationship with Sizeler Realty, Sizeler Real Estate or Connecticut General. *Id.* Absent factual support, petitioners suggest that the courts must *presume* a relationship between the parties. Petitioners cite no legal authority for this "presumption." The lower courts' application of Louisiana law provides no basis for review.

IV. Petitioners' Rhetoric Distorts The Applicable Legal Precepts.

Petitioners inaccurately recite the law on several occasions. Petitioners' statements about the role of the federal judiciary and federal summary judgment practice are especially egregious. Petitioners' claim that the "the federal judiciary has no interest in this matter beyond determining the fraudulent joinder question" is absolutely incorrect. (Petition at 15). The federal judiciary has a perfectly legitimate interest in deciding every matter within federal jurisdiction. If nondiverse defendants are improperly joined as they were in this case, the federal

courts may properly decide all remaining issues in the litigation. Petitioners' meritless claims against the diverse defendants were matters of legitimate interest to the federal courts and were properly dismissed.

The petitioners' dissatisfaction with the summary dismissal of their claims arises from an outdated view of federal civil procedure. Petitioners suggest that summary judgment is a disfavored procedural mechanism, describing it as a "drastic device." (Petition at 10). Petitioners' argument ignores this Honorable Court's guidance in *Celotex Corporation v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1966):

> Summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but as *an integral part of the Federal Rules as a whole*, which are designed "to secure the just, speedy and inexpensive determination of every action.". . . *Rule 56 must be construed with due regard* not only for the rights of persons asserting claims and defenses that are adequately based in fact to have those claims and defenses tried to a jury, but also *for the rights of persons opposing such claims and defenses to demonstrate in the manner provided by the Rule, prior to trial, that the claims and defenses have no factual basis.*

477 U.S. at 327; (emphasis added).

The proper application of Rule 56 required the dismissals of petitioners' claims.

Petitioners also misstate the standard for deciding a motion for summary judgment. Respondents' summary judgment motions did not require petitioners to demonstrate, as they claim, "ultimate success on the

merits." (Petition at 8). A party opposing a motion for summary judgment need only show genuine issues of material fact or that the moving party is not entitled to summary judgment as a matter of law. Fed. R. Civ. Pro. 56(c). Petitioners did not meet this standard.

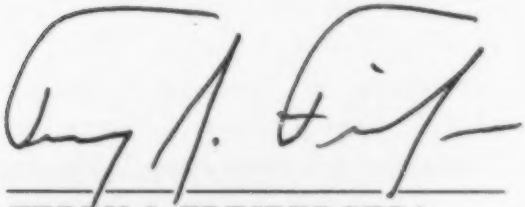
Petitioners claim that plaintiffs "cannot possibly know how to proceed" after the Fifth Circuit's decision. (Petition at 14). The answer is simple: plaintiffs should proceed in the manner required by Fed. R. Civ. Pro. 1 and as reiterated in *Celotex Corporation* — by taking those steps necessary "to secure a just, speedy and inexpensive determination of every action." Under the circumstances of this case, these criteria require a plaintiff to timely file a motion to remand. If faced with a motion for summary judgment, the plaintiff must diligently conduct whatever discovery he deems necessary to oppose that motion. As long as the plaintiff has adequate time to meet that motion, as here, it is of no moment that a federal district court exercises its discretion to hear both motions simultaneously. The United States District Court for the Eastern District of Louisiana followed Rule 1. Petitioners did not.

CONCLUSION

Respondents, Sizeler Realty Company, Inc., Sizeler Real Estate Management Company, Inc. and Connecticut General Life Insurance Company, on behalf of its Separate Account R, respectfully submit that the Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit should be denied.

Respectfully submitted,

MONTGOMERY, BARNETT, BROWN,
READ, HAMMOND & MINTZ

BY: 

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No. 89-1885

IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

THAIS CARRIERE, INDIVIDUALLY AND ON BEHALF OF RICHARD DARCEY CARRIERE, SAMUEL CARRIERE, V, LEANORA PAIGE CARRIERE TOMENY, THAIS MARIE CARRIERE and CLAYTON JOSEPH CARRIERE,

Petitioners,

v.

SEARS, ROEBUCK & COMPANY, SIZELER REALTY COMPANY, SIZELER REAL ESTATE MANAGEMENT COMPANY, INC., CONNECTICUT GENERAL LIFE INSURANCE COMPANY, ON BEHALF OF ITS SEPARATE ACCOUNT R, WILLIAM MCINNIS and ALLSTATE INSURANCE COMPANY,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF OF RESPONDENTS SEARS, ROEBUCK AND CO., WILLIAM McINNIS, AND ALLSTATE INSURANCE COMPANY IN OPPOSITION

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WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

INTERESTED PARTIES

The following list of parent companies and subsidiaries of respondents Sears, Roebuck and Co. and Allstate Insurance Company is provided pursuant to Supreme Court Rule 29.1:

160951 Canada Inc.
492398 Ontario Limited
AEMC of Wisconsin, Inc.
Allstate Development Corporation
Allstate Enterprises, Inc.
Allstate Enterprises Mortgage Corporation of New Mexico
Allstate Indemnity Company
Allstate Insurance Company
Allstate Insurance Company of Canada
Allstate International Inc.
Allstate Investment Management Company
Allstate Life Insurance Company
Allstate Life Insurance Company of Canada
Allstate Life Insurance Company of New York
Allstate Motor Club, Inc.
Allstate Property and Casualty Insurance Company
Allstate Reinsurance Co. Limited
Allstate Service Stations Limited
Allstate Settlement Corporation
Allstate Texas Lloyd's, Inc.
ARAPA-HO, CO.
Associated Gas Resources, Inc.
Banco de Credito Internacional, S.A.
Berry Referrals, Inc.
Best Buyer Home Protection Serviced by Sears, Inc.
Burkhart-AS 1983 Limited Partnership
Cameron Leasing Corporation
Centennial Valley Business Park Property Owners' Association
Civic Center Leasing Corporation
Clary, Oaksmith-Carlson, Inc.
Climate Diagnostic Systems, Inc.

Coldwell Banker Affiliates of Canada Inc.
Coldwell Banker & Company
Coldwell Banker Escrow Services, Inc.
Coldwell Banker Insurance Agency, Inc.
Coldwell Banker Ira E. Berry, Inc.
Coldwell Banker New Homes, Inc.
Coldwell Banker Real Estate Group, Inc.
Coldwell Banker Real Estate, Inc.
Coldwell Banker Referral Services, Inc.
Coldwell Banker Relocation Management Services, Inc.
Coldwell Banker Residential Affiliates, Inc.
Coldwell Banker Residential Brokerage Company
Coldwell Banker Residential Holding Company
Coldwell Banker Residential Mortgage Services, Inc.
Coldwell Banker Residential Real Estate
Coldwell Banker Residential Real Estate Services of Wisconsin, Inc.
Coldwell Banker Residential Referral Network
Coldwell Banker Residential Referral Network, Inc.
Coldwell Banker Settlement and Title Services, Inc.
Coldwell Banker Settlement and Title Services of Maryland, Inc.
Coldwell Banker Title Services, Inc.
Coldwell Banker Title Services, Inc.
Coldwell Banker Title Services, Inc.
Colony Gas Gathering—A Ltd. Partnership
Columbia Escrow Company, Inc.
Contill Realty Limited
Cook Street Credit Company
Dean Witter Advisers Inc.
Dean Witter Capital Advisers Inc.
Dean Witter Capital Corporation
Dean Witter Capital Markets—International (Asia) Ltd.
Dean Witter Capital Markets—International Ltd.
Dean Witter Capital Markets—International Ltd. (U.K.)

Dean Witter CMO Inc.
Dean Witter Equipment Corporation
Dean Witter Financial Services Group Inc.
Dean Witter Financial Services Inc.
Dean Witter Futures and Currency Management Inc.
Dean Witter Futures Limited
Dean Witter Holding Corporation
Dean Witter Leasing Corporation
Dean Witter Liberty Street Securities Inc.
Dean Witter Medical Equipment Management Corporation
Dean Witter Mortgage Capital Corp.
Dean Witter Mortgage Capital Corp. II
Dean Witter Puerto Rico, Inc.
Dean Witter Realty Credit Corporation
Dean Witter Realty Fifth Income Properties Inc.
Dean Witter Realty Fourth Income Properties Inc.
Dean Witter Realty Growth Properties Inc.
Dean Witter Realty Inc.
Dean Witter Realty Income Appreciation Inc.
Dean Witter Realty Income Associates I Inc.
Dean Witter Realty Income Associates II Inc.
Dean Witter Realty Income Properties I Inc.
Dean Witter Realty Income Properties II Inc.
Dean Witter Realty Income Properties III Inc.
Dean Witter Realty Yield Plus Assignor Inc.
Dean Witter Realty Yield Plus Inc.
Dean Witter Realty Yield Plus II Inc.
Dean Witter Reynolds (Canada) Inc.
Dean Witter Reynolds GmbH
Dean Witter Reynolds (Holdings) Limited
Dean Witter Reynolds (Hong Kong) Limited
Dean Witter Reynolds Inc.
Dean Witter Reynolds Insurance Agency (Indiana) Inc.
Dean Witters Reynolds Insurance Agency (Massachusetts) Inc.

Dean Witter Reynolds Insurance Agency (Ohio) Inc.
Dean Witter Reynolds Insurance Agency (Oklahoma) Inc.
Dean Witter Reynolds Insurance Agency (Texas) Inc.
Dean Witter Reynolds Insurance Services (Arizona) Inc.
Dean Witter Reynolds Insurance Services (Arkansas) Inc.
Dean Witter Reynolds Insurance Services (Illinois) Inc.
Dean Witter Reynolds Insurance Services Inc.
Dean Witter Reynolds Insurance Services (Puerto Rico) Inc.
Dean Witter Reynolds Insurance Services of New Jersey, Inc.
Dean Witter Reynolds Insurance Services (Montana) Inc.
Dean Witter Reynolds Insurance Services (New Hampshire) Inc.
Dean Witter Reynolds Insurance Services (South Dakota) Inc.
Dean Witter Reynolds Insurance Services (Wyoming) Inc.
Dean Witter Reynolds International, Inc.
Dean Witter Reynolds International Incorporated
Dean Witter Reynolds International S.A.
Dean Witter Reynolds (Italy) Inc.
Dean Witter Reynolds (Lausanne) S.A.
Dean Witter Reynolds Limited
Dean Witter Reynolds Partners Inc.
Dean Witter Reynolds (Geneva) S.A.
Dean Witter Reynolds (Lugano) S.A.
Dean Witter Reynolds (S.E.A.) Pte. Ltd.
Dean Witter Reynolds S.p.A.
Dean Witter Reynolds Venture Equities Inc.
Dean Witter Transportation Leasing Corporation

Dean Witter Trust Company
Dean Witter Venture Management Inc.
Delaware Chino Development Corporation
Delaware Seminole County Investment Company
Delaware Westgate Corporation
Demeter Management Corporation
Direct Marketing Center Inc.
Discovery Card Bank of New Castle
Discover Card Services, Inc.
Discover Credit Corp.
Discover Receivables Financing Corporation
DM Management Company
Dur-O-Wal, Inc.
Dur-O-Wal, Ltd.
DW Administrators Inc.
DWCC-Miller Holdings, Inc.
DWR Partnership Administrators Inc.
DWR Special Advisors Inc.
DWR Special Partners Inc.
DWR Wind Technologies Inc.
Enclave Advancement Group, Inc.
Enterprise Services Corporation
Executrans Canada Limited
Executrans, Inc.
Exec-Van Systems, Inc.
Eye Care Centers of America, Inc.
Fallowfield Developers Limited Partnership
First Assurance Company
Fleet Maintenance, Inc.
Forest E. Olson, Inc.
Forty Fifth and Main Redevelopment Corporation
Gateway Property Owners' Association
General Underwriters Agency, Inc.
Greenbrier Mall Venture
Greenwood Trust Company
Grey City Graphics, Inc.
Guardian Title Company
HAFV Corporation

HCC Communications Company
HDXR Associates
HLMA Corporation
HO-CO Springs Co.
HO Austin Development Co.
HO Bell Road Investment Corp.
HO Chandler Investment Inc.
HO Concord Land Co., Inc.
HO East Mesa Investment, Inc.
HO El Segundo, Inc.
HO Frisco Development Co.
HO Glendale Investment Co.
HO Lakeland Mall Investment Co.
HO Lewisville Investment Corp.
Holiday Homes International Corp.
Homart Community Centers, Inc.
Homart Development Co.
Homart Hamden Investment Co.
Homart Manchester Investment Co.
Homart San Antonio Investment Co.
Homart Shavano Investment Co.
HO Meriden Square Development Co.
HOM Investment Corp.
HO Montgomery Development, Co.
HO Nashville Investment Corporation
HO Pembroke Square Mall Investment Co.
HO Peoria Development Co.
HO Simi Valley Development Co.
HO South Ft. Worth Development Co.
HO Spring Hill, Inc.
HO Tampa Development Co.
HO Tysons Office Investment Co.
Hurley State Bank
Kansas City Referral Network, Inc.
Kerrybrooke Development Limited
Kerrytor Limited
Kilroy Co-Investment Partners III, L.P.
Kingsway Imports Ltd.

Lee Leasing Corporation
Lee Estimations Gillos Bordeleau Inc.
Levolor Corporation
Lewiston Leasing Corporation
Liberty Realty Advisors Inc.
Liberty Street Management Inc.
Lincoln Benefit Life Company
LLJV Funding Corporation
Market Credit Corp.
Mason Park Property Owners' Association
Mature Outlook Inc.
Midland Asia Ltd.
Midland (Europe), Ltd.
Midland International Corporation
Midland Overseas, Ltd.
MontorLab Inc.
North Atlanta Venture, Inc.
Northbrook Indemnity Company
Northbrook Investment Management Company
Northbrook Life Insurance Company
Northbrook National Insurance Company
Northbrook Property and Casualty Insurance Company
North Tampa Venture, Inc.
NTW Incorporated
Omni Investors, Inc.
Omnitrue Merging Corp.
One Water Corporation
Pinstripes Petites, Inc.
PMI Insurance Co.
PMI Mortgage Insurance Co.
PMI Securities Co.
Preston Park South Property Owners' Association
Previews Incorporated
Price & Pierce Group Ltd.
Private Brands, Ltd .
Provident Title Company
Quetor Realty Limited

Realty Management Services Inc.
Referral Network, Inc.
Regbrooke Limited
Reynolds Securities Inc.
Ridgewell, Fox and Partners (Underwriting Management Limited)
Sanguine/A Anadarko, Ltd.
Sartell Leasing Corporation
SCFC Receivables Corp.
SCFC Receivables Financing Corporation
Science Center Associates
Scripps Center Associates
Sears (1978) Limited
Sears Acceptance Company Inc.
Sears Buying Services, Inc.
Sears Buying Services (Japan) K.K.
Sears Canada Inc.
Sears Communications Company
Sears Communications Network Canada Inc.
Sears Consumer Discount Company
Sears Consumer Financial Corporation
Sears Consumer Financial Corporation of Delaware
Sears Consumer Financial Corporation of Iowa
Sears Consumer Financial Corporation of Tennessee
Sears Driving School, Inc.
Sears Finance Corporation
Sears Holdings Limited
Sears International Marketing, Inc.
Sears Investment Management Co.
Sears Limited
Sears Mortgage Corporation
Sears Mortgage Funding Corporation
Sears Mortgage Securities Corporation
Sears Overseas Finance N.V.
Sears Payment Systems Inc.
Sears Properties Inc.
Sears Receivables Financing Group, Inc.
Sears, Roebuck Acceptance Corp.

Sears, Roebuck and Co. B.V.
Sears, Roebuck de Espana, S.A.
Sears, Roebuck de Mexico, S.A. de C.V. (Mexico)
Sears, Roebuck de Puerto Rico, Inc.
Sears, Roebuck Limited (England)
Sears, Poebuck Overseas, Inc.
Sears, Roebuck Pty. Limited (Australia)
Sears, Roebuck S.A. (Central America)
Sears Savings Bank
Sears Technology Services, Inc.
Sears Tower Management-Company
Sears World Trade, Inc.
Sears World Trade (Korea) Inc.
Sears World Trade (Taiwan), Inc.
Shell Beach Hotel Corporation
SikaHo Transport, Inc.
St. Laurent Shopping Centre Limited (Canada)
Surety Life Insurance Company
Tech-Cor, Inc.
Tempo-GP, Inc.
Tempo-LP, Inc.
Terminal Freight Handling Co.
Tire America, Inc.
Titan Rubber International, Inc.
Top South Limited
Tower Ventures Inc.
Trans-Coast Services, Inc.
Truswal Company, AB
Truswal Real Estate (California) Inc.
Truswal Real Estate (Colorado), Inc.
Truswal Real Estate (Maryland), Inc.
Truswal Systems Corporation
Truswal Systems of Canada, Ltd.
Truswal Systems, Ltd.
Tysons II Property Owners Association
Valley of California, Inc.
Ventor Realty Limited
WAAS of Port Arthur, Inc.

WASCO Insurance Agency, Inc.
WASCO of Lawrence, Inc.
WASCO of Sedalia, Inc.
Washington Business Park Associates
Western Acceptance Company
Western Acquisition, Inc.
Western Auto Supply Company
Western Auto Supply Company of Ontario Limited
Wilshire Landmark I
Wintor Realty Limited
Wisconsin Referral Network, Inc.
Xerox Centre Associates

TABLE OF CONTENTS

	Page
INTERESTED PARTIES	i
TABLE OF AUTHORITIES	xii
OPINION BELOW	1
STATUTES AND RULES	2
STATEMENT OF THE CASE	5
SUMMARY OF THE ARGUMENT	10
ARGUMENT	11
I. REMAND WAS PROPERLY DENIED IN THAT THE NONDIVERSE DEFENDANTS WERE FRAUDULENTLY JOINED	11
II. THE SUMMARY JUDGMENTS WERE PROPERLY GRANTED	14
III. PLAINTIFFS PRESENT NO SERIOUS QUESTIONS FOR REVIEW	15
CONCLUSION	23

TABLE OF AUTHORITIES

Cases	Page
American Dredging Co. v. Atlantic Sea Con. Ltd., 637 F. Supp. 179 (D.N.J. 1986)	11
American Fire & Casualty Co. v. Finn, 341 U.S. 6, 71 S. Ct. 534, 95 L. Ed. 702 (1951)	18
Anderson v. Liberty Lobby, Inc., 477 U.S. 252, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)	15
B., Inc. v. Miller Brewing Co., 663 F.2d 545 (5th Cir. 1981)	11, 12, 16
Balla v. Idaho State Board of Corrections, 869 F.2d 461 (9th Cir. 1989)	9
Banks v. Hyatt, 722 F.2d 214 (5th Cir. 1984)	14
Bazley v. Tortorich, 397 So. 2d 475 (La. 1981)	12
Bobby Jones Garden Apts. v. Suleski, 391 F.2d 172 (5th Cir. 1968)	11
Carnegie-Mellon University v. Cohill, 484 U.S. 343, 108 S. Ct. 614, 98 L. Ed. 2d 720 (1988)	19, 20
Carriere v. Sears, Roebuck and Co., 893 F.2d 98 (5th Cir. 1990)	1, 21
Celotex Corp. v. Catrett, 477 U.S. 317, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)	15
Commercial Associates v. Tilcon Gammino, Inc., 670 F. Supp. 461 (D.R.I. 1987)	18
Davis v. Southern Louisiana Insulations, 539 So. 2d 922 (La. App. 4th Cir. 1989)	12
Fallo v. Tuboscope Inspection, 444 So. 2d 621 (La. 1984)	12, 13
Fontenot v. Upjohn, 780 F.2d 1190 (5th Cir. 1983)	17
Fristoe v. Reynolds Metals Co., 615 F.2d 1209 (9th Cir. 1980)	18
Harris v. Pizza Hut of Louisiana, Inc., 455 So. 2d 1364 (La. 1984)	14
Harris v. Edward Hyman Co., 664 F.2d 943 (5th Cir. 1981)	18
Hartford Acc. & Indem. Co. v. Costa Lines Cargo Services, Inc., Nos. 89-3020 and 89-3273, slip op. (5th Cir. May 31, 1990)	18
Hensgens v. Deere & Co., 833 F.2d 1179 (5th Cir. 1987)	20

TABLE OF AUTHORITIES—Continued

Page

Johnson v. Odeco Oil and Gas Company, 679 F. Supp. 604 (E.D. La. 1987) 18
Keating v. Shell Chemical Co., 610 F.2d 328 (5th Cir. 1980) 11, 16
Kent v. Joma Products, Inc., 542 So. 2d 99, 100 (La. App. 1st Cir. 1989) 12
Lewis v. TIME, Inc., 83 F.R.D. 455 (E.D. Cal. 1979) 11
Maddie v. Plastic Supply & Fabrication, Inc., 434 So. 2d 158 (La. App. 5th Cir. 1983), *writ denied*, 435 So. 2d 445 (La. 1983) 12, 15
Mayer v. Valentine Sugars, Inc., 444 So. 2d 618 (La. 1984) 13
Matsushita Electrical Industrial Co. v. Zenith Radio Corp., 475 U.S. 574, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986) 15
McKay v. Boyd Construction Co., Inc., 769 F.2d 1084 (5th Cir. 1985) 17, 18
Parks v. New York Times Co., 308 F.2d 474 (5th Cir. 1962), *cert. denied*, 376 U.S. 949, 84 S. Ct. 964, 11 L. Ed. 2d 969 (1964) 11
Reagan v. Olinkraft, Inc., 408 So. 2d 937 (La. App. 2d Cir. 1981), *writ denied*, 412 So. 2d 1095 (La. 1982) 13
Roberts v. Vulcan Material Company, 558 F. Supp. 108 (M.D. La. 1983) 18
Securities & Exchange Comm'n v. Spence & Green Chem. Co., 612 F.2d 896, 901 (5th Cir. 1980) 17
Simoneaux v. E.I. duPont de Nemours & Co., 483 So. 2d 908 (La. 1986) 13
Tedder v. F.M.C. Corp., 590 F.2d 115 (5th Cir. 1979) 11
Walker v. Grantham, 449 So. 2d 12 (La. App. 1st Cir. 1984) 12
Willmar Poultry Co. v. Morton-Norwich Products, Inc., 520 F.2d 289 (8th Cir. 1975), *cert. denied*, 424 U.S. 915, 96 S. Ct. 1116, 47 L. Ed. 2d 320 (1976) 17

TABLE OF AUTHORITIES—Continued

Page

Willie v. American Cas. Co., 547 So. 2d 1075 (La. App. 1st Cir. 1989) 20, 22

Statutes and Rules

28 U.S.C. 1447 19
Supreme Court Rule 10 23
Supreme Court Rule 15.1 9
Fed. R. Civ. P. 4(j) 8, 15
Fed. R. Civ. P. 11 16
Fed. R. Civ. P. 12(b)(6) 19
Fed. R. Civ. P. 54(b) 9
Fed. R. Civ. P. 56(c) 15, 19
Fed. R. Civ. P. 56(f) 17
La. R.S. 22:655 8
La. R.S. 23:1032 ..... 12, 16
La. Code Civ. P. art. 863 16

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

No. 89-1885

THAIS CARRIERE, INDIVIDUALLY AND ON BEHALF OF RICHARD DARCEY CARRIERE, SAMUEL CARRIERE, V, LEANORA PAIGE CARRIERE TOMENY, THAIS MARIE CARRIERE and CLAYTON JOSEPH CARRIERE,

Petitioners,

v.

SEARS, ROEBUCK & COMPANY, SIZELER REALTY COMPANY, SIZELER REAL ESTATE MANAGEMENT COMPANY, INC., CONNECTICUT GENERAL LIFE INSURANCE COMPANY, ON BEHALF OF ITS SEPARATE ACCOUNT R, WILLIAM MCINNIS and ALLSTATE INSURANCE COMPANY,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF OF RESPONDENTS SEARS, ROEBUCK AND CO., WILLIAM McINNIS, AND ALLSTATE INSURANCE COMPANY IN OPPOSITION

OPINION BELOW

The opinion of the Fifth Circuit in this case is reported at 893 F.2d 98.

STATUTES AND RULES

28 U.S.C. § 1332 (1988). Diversity of citizenship; amount in controversy; costs

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and is between—

(1) citizens of different States;

28 U.S.C. § 1441 (1988). Actions removable generally

(a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.

(b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

28 U.S.C. § 1447 (1988). Procedure after removal generally

(a) In any case removed from a State court, the district court may issue all necessary orders and process to bring before it all proper parties whether served by process issued by the State court or otherwise.

* * * *

(c) If at any time before final judgment it appears that the case was removed improvidently and without

jurisdiction, the district court shall remand the case, and may order the payment of just costs. A certified copy of the order of remand shall be mailed by its clerk to the clerk of the State court. The State court may thereupon proceed with such case.

Fed. R. Civ. P. 56. Summary Judgment

* * * *

(b) For Defending Party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof.

(c) Motion and Proceedings Thereon. . . . The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. . . .

* * * *

(e) Form of Affidavits; Further Testimony; Defense Required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for

trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

(f) When Affidavits are Unavailable. Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) Affidavits Made in Bad Faith. Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused the other party to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

Rule 81. Applicability in General

* * * *

(c) Removed Actions. These rules apply to civil actions removed to the United States district courts from the state courts and govern procedure after removal. * * *

La. Rev. Stat. 23:1032.

Exclusiveness of rights and remedies; employer's liability to prosecution under other laws

The rights and remedies herein granted to an employee or his dependent on account of an injury, or compensable sickness or disease for which he is entitled to compensation under this Chapter, shall be exclusive of all other rights and remedies of such employee, his personal repre-

sentatives, dependents, or relations, against his employer, or any principal or any officer, director, stockholder, partner or employee of such employer or principal, for said injury, or compensable sickness or disease.

STATEMENT OF THE CASE

Sam Carriere was employed by Sears, Roebuck and Co. as security manager of its retail store in Lake Forest Plaza Shopping Center in New Orleans, Louisiana. The store's security system included a number of surveillance cameras that fed pictures to monitors installed in one of the security offices. Mr. Carriere was watching those monitors late in the afternoon of February 2, 1987, when he noticed something suspicious on the feed from the loading dock. He turned on the video recorder and left the office.

William McInnis, a full-time police officer with the New Orleans Police Department working for Sears part-time as a security assistant, was taking a car theft report from two customers in the adjacent office. Mr. Carriere, in leaving, did not tell Officer McInnis where he was going and did not ask for assistance. But within minutes Mr. Carriere radioed Officer McInnis from the loading dock with an urgent call for back-up. Officer McInnis immediately ran to the loading dock, only to find that Mr. Carriere had been fatally shot. The identity of Mr. Carriere's murderer has never been ascertained.

Plaintiffs are Mr. Carriere's widow and children. They filed this wrongful death/survival action under Louisiana state law in the Civil District Court for the Parish of Orleans, State of Louisiana, on January 28, 1988.

They joined as defendants Officer McInnis and Allstate Insurance Company, alleged to have been his insurer; Sears itself, employer of both Carriere and McInnis and owner of the store and the loading dock and of the parking lot that surrounded them both; Connecticut General

Life Insurance Company, owner of the rental space in the shopping center and of parking areas ancillary to it; and Sizeler Realty Company, alleged to be Connecticut General's on-site manager. Plaintiffs were all Louisiana residents, as were defendants McInnis and Sizeler Realty. The remaining defendants were all incorporated outside of Louisiana and had their respective principal offices outside of Louisiana.

The diverse defendants timely removed the case to the United States District Court for the Eastern District of Louisiana on March 7, 1988. The district court's jurisdiction was premised on diversity of citizenship, it being defendants' contention that McInnis and Sizeler Realty had been fraudulently joined. Plaintiffs filed their motion to remand within about two weeks, on March 23, 1988, and noticed the motion for hearing on April 21. On April 12 and 13, Sizeler Realty, Connecticut General, Sears and Allstate filed their oppositions to the remand motion and supporting affidavits.[1] On April 18, 1988, plaintiffs moved to continue the hearing of their motion to remand on grounds that the issues raised by defendants in their oppositions had transformed it into something "in the nature of a motion for summary judgment" and that they needed more time to prepare.

On April 26, 1988, plaintiffs sought and obtained leave to amend to join Sizeler Real Estate Management Company, as an additional defendant. The amendment was prompted by an affidavit filed in support of Connecticut General and Sizeler Realty's opposition to the motion to remand that explained that Sizeler Realty had been replaced by Sizeler Management as Connecticut General's on-site manager at Lake Forest on January 7, 1987, five weeks or so *before* Mr. Carriere was shot.[2] The joinder

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[1] Officer McInnis had not been served by this point and did not make an appearance.

[2] It is, from all appearances, uncontroverted by plaintiffs that Sizeler Management, not Sizeler Realty, was, in fact, Connecticut

of Sizeler Management clearly altered the procedural posture of the case and prompted Sizeler Realty and Connecticut General to move for a second continuance of the hearing, so that it might be joined with the hearing of their anticipated summary judgment motions. All parties consented to the motion and the hearing was reset for July 13, 1988.

On May 25 and 27, Sizeler Realty, Sizeler Management, and Sears filed motions for summary judgment, relying in part on the affidavits filed earlier in opposition to the remand motion and in part on new affidavits. More than a month later, on July 6 and 8, plaintiffs filed their opposition to the summary judgment motions and a supplemental memorandum in support of their motion to remand. Plaintiffs filed five affidavits in support of the new papers.

In preparing for the July 13 hearing, Sears learned of serious defects in plaintiffs' affidavits. It filed a motion to strike them on the morning of the hearing, on grounds that they were unsworn, that certain of them had been altered, that they were not on the affiants' personal knowledge, and that they had been submitted in bad faith.

The substantive motions depended on showings that Officer McInnis and Sears enjoyed immunity from suit in tort under Louisiana's Workers' Compensation Act, absent supportable allegations that they had committed intentional torts that contributed to Mr. Carriere's death and that Sizeler Realty/Management had assumed no actionable responsibility for security on Sears' premises.

General's manager on February 2, 1987. Plaintiffs did not, however, drop Sizeler Realty as a defendant when they added Sizeler Management. Their approach to the issue in this Court, as it was in the Fifth Circuit, is to refer to the two concerns jointly as the "Sizeler Interests" and to imply that they sued both concerns in state court. They didn't. *See* Petition for Certiorari at 3 and *passim*.

By minute entry dated July 15, 1988, the district court granted both the motion to strike the affidavits and the defendants' summary judgment motions. Misperceiving that plaintiffs had joined a claim for death benefits under Louisiana's Workers' Compensation Act[3] to their wrongful death claim, the court also attempted to remand the claim for compensation benefits to the state court. The order was clarified and amended by minute entry of August 29, 1988, to deny the remand motion outright.

Allstate was dismissed by order of November 1, 1988, on a summary judgment motion supported by affidavits showing that Allstate had no insurance in effect covering Officer McInnis.[4] Officer McInnis, having been finally served with process on October 10, 1988, was dismissed on November 1 as well, pursuant to Fed. R. Civ. P. 4(j).

The final dismissal was handed down on January 11, 1989, on Connecticut General's motion for summary judgment.

Plaintiffs had served state-court interrogatories and requests for production on Sears on February 26, 1988. Sears served its responses on April 13, 1988, its time for responding having been enlarged by the court on motion. Plaintiffs made no other efforts at discovery through the hearing on the remand and summary judgment motions in July. They did notice and take depositions in November 1988 in connection with the summary judgment motion filed by Connecticut General, then the sole remaining defendant. The transcripts of those depositions were considered by the court in ruling on Connecticut General's motion and were found by it not to raise a genuine issue of material fact.

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[3] Plaintiffs have never complained that they are not, in fact, receiving appropriate benefits under the Act.

[4] Allstate was sued under Louisiana's direct action statute, La. R.S. 22:655.

In view of this Court's Rule 15.1, Sears, Allstate, and Officer McInnis note the following discrepancies between the plaintiffs' recitation of facts and an accurate one:

1) Plaintiffs brought suit on January 28, 1988, not February 3, 1988.[5]

2) Defendants raised the issue of fraudulent joinder explicitly in their removal petition, served on plaintiffs through counsel on or about March 7, 1988, fully four months—not six weeks—before the July 13 hearing on the remand and summary judgment motions.[6]

3) Plaintiffs' motion to continue the July 13 hearing was not supported by an affidavit of counsel "setting forth the need for specific discovery"; counsel's affidavit suggested only that depositions that he had neglected to schedule in the prior four months might produce some unspecified advantage to his clients' case.[7]

4) Plaintiffs' counsel had been informed of the grounds of Sears' objection to his use of the defective affidavits and of its intention to move to strike them by phone on July 8, 1988, within 48 hours of their having been served on Sears by counsel, and five days before the hearing.[8]

5) It was 349 days—not 169 days—from the initiation to final disposition, under Fed. R. Civ. P. 54(b), of plaintiffs' case in the district court[9]; the earlier dismissals were, of course, interlocutory and could have been reconsidered in the trial court until January 11, 1989.[10]

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[5] *See* Petition for Certiorari at 3.

[6] *See id.* at 4.

[7] *See id.* at 4.

[8] *Contrast id.*

[9] *See id.* at 6.

[10] *See* Balla v. Idaho State Board of Corrections, 869 F.2d 461, 465 (9th Cir. 1989), *citing* Marconi Wireless Telegraph Co. v. United States, 320 U.S. 1, 47-48, 63 S. Ct. 1393, 1414-15, 87 L. Ed. 2d 1731 (1943).

SUMMARY OF THE ARGUMENT

I.

The district court appropriately pierced plaintiffs' pleadings in determining that the nondiverse defendants had been fraudulently joined. There was no genuine contest over Officer McInnis' immunity from suit in tort under the Louisiana Worker's Compensation Act and no showing of a basis from which to conclude that the shopping center manager was responsible for security on Sears' premises.

II.

Connecticut General, owner of the leased space in the shopping center, had no obligation, by contract or in practice, to provide for the security of Sears' premises. Sears did not injure Mr. Carriere intentionally and so remained immune from suit in tort. Allstate did not insure Officer McInnis. Summary judgment dismissing Connecticut, Sears, and Allstate were properly granted.

III.

A. A summary judgment-like procedure is appropriate for reviewing matters of substantive fact on a claim of fraudulent joinder. Absent a showing of good cause and of diligence in pursuing discovery, plaintiffs were not entitled to a third continuance of the hearing on their motion to remand.

B. Plaintiffs could not have waived an objection to the district court's diversity jurisdiction. They could not, therefore, have been impeded in their discovery efforts by a reasonable fear of waiver.

C. The values of economy, convenience, fairness and comity were served by the prompt and efficient resolution of this controversy under applicable Louisiana law.

D. The Fanguy affidavit created no genuine issue about Officer McInnis' exposure, and Louisiana law does

not impose upon a land owner a duty to see to the security of persons on neighboring property.

ARGUMENT

I. REMAND WAS PROPERLY DENIED IN THAT THE NONDIVERSE DEFENDANTS WERE FRAUDULENTLY JOINED.

An allegation of fraudulent joinder does not challenge the plaintiffs' subjective motive in joining a nondiverse defendant but rather tests the *possibility* that a state court, applying its own laws, would find the nondiverse defendant or defendants liable on the claim asserted. *B., Inc. v. Miller Brewing Co.*, 663 F.2d 545, 549 (5th Cir. 1981); *Tedder v. F.M.C. Corp.*, 590 F.2d 115, 117 (5th Cir. 1979). Where there is no such possibility, the citizenship of the nondiverse defendant is disregarded for purposes of determining federal jurisdiction. *See American Dredging Co. v. Atlantic Sea Con. Ltd.*, 637 F. Supp. 179 (D.N.J. 1986); *Lewis v. TIME, Inc.*, 83 F.R.D. 455 (E.D. Cal. 1979).[11]

The burden of persuasion is on the party asserting fraudulent joinder. That burden is not, however, to show that the plaintiff has failed to state a claim against the nondiverse defendant, but rather only to show that "there is *no possibility* that the plaintiff would be able to establish a cause of action against the instate defendant in state court. . . ." *B., Inc., supra*, 663 F.2d at 549, citing *Keating v. Shell Chemical Co.*, 610 F.2d 328, 331 (5th Cir 1980); *Tedder, supra*; *Bobby Jones Garden Apts. v. Suleski*, 391 F.2d 172, 177 (5th Cir. 1968); *and Parks v. New York Times Co.*, 308 F.2d 474, 478 (5th Cir.

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[11] There may, of course, also be questions of subjective fraud on a plaintiff's part and of error, whether intentional or not, in a plaintiff's allegations bearing directly on citizenship, but this case doesn't turn on them. *See generally*, B., Inc., *supra*, 663 F.2d at 545.

1962), *cert. denied*, 376 U.S. 949, 84 S. Ct. 964, 11 L. Ed. 2d 969 (1964). To determine whether the plaintiff could establish a claim against the nondiverse defendant, the district court is to consider the *uncontested* substantive facts—as they are made to appear in the affidavits, deposition transcripts, and other similar material received by the court—and to resolve all *contested* matters in favor of the plaintiff. *B., Inc., supra*, 663 F.2d at 549. The procedure is similar to that employed on a mation for summary judgment. *B., Inc., supra*, 663 F.2d at 549 n.9, *citing Keating, supra*, 610 F.2d at 333. A district court must have such a procedure available to it if its removal jurisdiction is not to be eviscerated by clever but factually insupportable pleading.

The pleadings and affidavits submitted in this case on the remand motion established, without contest, that Mr. Carriere was in the course of his employment with Sears when he was killed; that Officer McInnis was a co-employee; and that Officer McInnis had no hand in Mr. Carriere's murder, did not intend that it take place, and was not substantially certain that it would take place. On those facts, the applicable law relegates Mr. Carriere's survivors to an action for death benefits under Louisiana's Workers' Compensation Act. La. R.S. 23:1032 (co-employees mutually immune in tort for workplace accidents except in case of "intentional act"); *Fallo v. Tuboscope Inspection*, 444 So. 2d 621, 622 (La. 1984); *Bazley v. Tortorich*, 397 So. 2d 475, 481 (La. 1981) (intent explained as conscious desire that the physical result of an act ensue or a substantial certainty that it will ensue); *Kent v. Joma Products, Inc.*, 542 So. 2d 99, 100-01 (La. App. 1st Cir. 1989); *Davis v. Southern Louisiana Insulations*, 539 So. 2d 922, 924 (La. App. 4th Cir. 1989); *Walker v. Grantham*, 449 So. 2d 12 (La. App. 1st Cir. 1984); *Maddie v. Plastic Supply & Fabrication, Inc.*, 434 So. 2d 158 (La. App. 5th Cir. 1983), *writ denied*, 435 So. 2d 445 (La. 1983) (even gross negligence insufficient to permit imputation of intent);

Reagan v. Olinkraft, Inc., 408 So. 2d 937, 940 (La. App. 2d Cir. 1981), *writ denied*, 421 So. 2d 1095 (La. 1982) ("substantially certain" explained as "virtually sure" or "nearly inevitable").[12] There was, therefore, no possibility of a claim against Officer McInnis.

Sizeler Realty's joinder as an original defendant in state court was obviously a mistake on plaintiffs' part. The uncontroverted evidence presented to the court showed that it had been replaced as Connecticut General's on-site manager at Lake Forest some five weeks before Mr. Carriere was shot and that Sizeler Management had taken over its responsibilities. Sizeler Realty wasn't there, had no duty to be there, and didn't even have an opportunity to commit a wrong actionable by Mr. Carriere's survivors.

Sizeler Management was added as a defendant after removal on plaintiffs' application for leave to amend, obtained without Sears or Allstate's consent. The claim against it was for negligent provision of security services at the Lake Forest center. But the uncontested substantive facts were that Sears owned its land and building and provided its own security; that the incident in which Mr. Carriere was shot took place entirely on Sears' premises; and that Sizeler Management had neither the responsibility nor the authority to patrol or secure the Sears store, loading dock, or parking lot. Louisiana imposes upon its citizens no duty to protect others against the criminal acts of third persons, even foreseeable crim-

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[12] Louisiana courts have endorsed summary judgment procedures for traversing general allegations that a defendant has lost his immunity from suit in tort by commission of an intentional act that injures an employee. Simoneaux v. E.I. duPont de Nemours & Co., 483 So. 2d 908 (La. 1986); Fallo v. Tuboscope Inspection, *supra*; *and see* Mayer v. Valentine Sugars, Inc., 444 So. 2d 618 (La. 1984) (recommending the defendant file a motion for summary judgment on the intentional act issue on remand despite confirmation that plaintiff's general allegations of intent were sufficient to defeat defendant's pleading-bound exception of no cause of action).

inal acts, except where the parties are in a special relationship. *Harris v. Pizza Hut of Louisiana, Inc.*, 455 So. 2d 1364, 1371 (La. 1984). Innkeepers and their guests have such a relationship. *Banks v. Hyatt*, 722 F.2d 214 (5th Cir. 1984). So do business owners and those foreseeably attracted to their business premises. *Harris, supra*, 455 So. 2d at 1369. There is no such special relationship between a business owner and a security officer hired to protect neighboring premises. It follows that plaintiffs would not have been able to establish their claim against Sizeler Management.

Plaintiffs' motion to remand was, therefore, properly denied.

II. THE SUMMARY JUDGMENTS WERE PROPERLY GRANTED.

The summary dismissal of plaintiffs' claims against Connecticut General follows from the determination that Sizeler Management, which operated that portion of the Lake Forest center that Connecticut General owned, was fraudulently joined. For it, as well, had no such relationship with Sears or anyone else, by contract or in practice, that would have obliged it to provide or see to the provision of security on Sears' premises. Depositions taken in November 1988 had shed no adverse light on the defense.

Allstate's dismissal was entered on affidavits of Allstate's regional manager and Officer McInnis, its supposed insured, showing that it had not, in fact, issued a policy covering Officer McInnis.

Sears' summary dismissal was on grounds that it, like Officer McInnis, enjoyed immunity from suit in tort absent an intentional act. Plaintiffs' allegations against it were broader than those made against Officer McInnis but equally insubstantial. Sears submitted affidavits in support of its motion denying a corporate intent that Mr. Carriere be killed, abjuring knowledge of involvement

in the murder by any of its employees, detailing Mr. Carriere's training for his job as security manager, and explaining that its policy against the carrying of handguns by its civilian security personnel had been adopted in the interests of employee and customer safety.

Plaintiffs failed to controvert the affidavits or to explain adequately why they needed more time to do so. They admitted, instead, in a district court brief, that their case against Sears depended on a suspicion that Sears knew, probabilistically, that its policies would result in a death or serious injury, sometime, someplace, rather than on a contention that it had a specific understanding that Mr. Carriere would be wounded or killed. Probabilistic knowledge, even where established, will not support a finding of an intentional act. *Maddie v. Plastic Supply & Fabrication, supra,* 434 So. 2d at 161.

A summary judgment in Sears' favor was, therefore, rendered as required by Fed. R. Civ. P. 56(c). *See Celotex Corp. v. Catrett,* 477 U.S. 317, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986); *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986); *Matsushita Electrical Industrial Co. v. Zenith Radio Corp.,* 475 U.S. 574, 106 S. Ct. 1348, 89 L. Ed. 2d. 538 (1986) (summary judgment granted where nonmovant fails to adduce "sufficient facts showing that there is a genuine issue for trial").[13]

III. PLAINTIFFS PRESENT NO SERIOUS QUESTIONS FOR REVIEW.

A. The first of plaintiffs' four arguments for issuance of the writ is in two parts, both confused. The first is that the Fifth Circuit was untrue to its own controlling precedent in approving the district court's piercing of the

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[13] Officer McInnis' dismissal was, in light of the determination that he had been fraudulently joined, probably unnecessary. It was, however, clearly authorized by Fed. R. Civ. P. 4(j), in view of plaintiffs' unexplained delay in serving him.

pleadings on substantive, as opposed to jurisdictional, facts. The second is that plaintiffs were not given an adequate opportunity to develop the substantive factual issues.

The first part of the argument isn't good history. The Fifth Circuit's prior decisions make it clear that a full scale "evidentiary hearing would indeed be appropriate" in case of alleged misrepresentations of jurisdictional matters, such as the corporate existence of a named defendant or the true domicile of the parties. *B., Inc., supra*, 663 F.2d at 551 n.14. But those decisions also explicitly authorize a summary judgment-like review of substantive matters to resolve a claim of fraudulent joinder. *Id.*, 663 F.2d at 549 n.9, *citing Keating, supra*, 610 F.2d at 333.

The issue in *Keating* was, as one of the issues is here, whether a plaintiff injured on the job had stated a colorable claim under Louisiana law against a co-employee. The Fifth Circuit sustained the district court's finding that plaintiff had failed to allege an intentional act, but it remanded the case to the district court for consideration of the alternative allegations that the defendant co-employee was not in the course and scope of his employment at the time of the accident and, therefore, that he was not entitled to tort immunity under La. R.S. 23:1032, irrespective of intent. The Fifth Circuit directed that the course-and-scope issue be determined "[b]y summary judgment or otherwise" but short of "a full dress trial on the merits." 610 F.2d at 331-33.

It could not be clearer that the procedure employed and approved in this case is of legitimate and long-standing Fifth Circuit pedigree.

The second part of plaintiffs' first argument is not that the Fifth Circuit procedure is flawed in concept, but rather that it puts plaintiffs to their proof too early. But Rule 11 and its state cognates, like La. Code Civ. P.

art. 863, warn parties and their attorneys to make their factual and legal inquiries before filing. And Fed. R. Civ. P. 56(f), by analogy, safeguards against a premature jurisdictional call, provided only that the plaintiff has been diligent in pursuing discovery, presents specific facts to explain his inability to support his position, and demonstrates specifically "how postponement of a ruling on the motion will enable him, by discovery or other means, to rebut the movant's showing of the absence of a genuine issue of fact." *Willmar Poultry Co. v. Morton-Norwich Products, Inc.*, 520 F.2d 289, 297 (8th Cir. 1975), *cert. denied*, 424 U.S. 915, 96 S. Ct. 1116, 47 L. Ed. 2d. 320 (1976), *cited in Securities & Exchange Comm'n v. Spence & Green Chem. Co.*, 612 F.2d 896, 901 (5th Cir. 1980); *and see Fontenot v. Upjohn*, 780 F.2d 1190, 1193 (5th Cir. 1983).

In this case, plaintiffs did no discovery during the period of over four months between removal and denial of the motion to remand. Counsel's affidavit utterly failed to identify specific hopes for further discovery. Indeed, the discovery done by plaintiffs during the four months after denial of the remand motion was insufficient to create a genuine issue with respect to a diverse defendant, Connecticut General, or to impugn the dismissals and other rulings already rendered. Orders denying motions to continue hearings are reviewed on an abuse-of-discretion standard. *Fontenot v. Upjohn, supra*, 780 F.2d at 1193. There is nothing in plaintiffs' application to raise even a suspicion that the district court here abused its discretion in actually hearing and deciding plaintiffs' motion to remand on its third setting.

B. Plaintiff's second argument for issuance of the writ is founded on a simple misunderstanding of the jurisprudence on waiver of removal defects. A reading of one of plaintiffs' own authorities, *McKay v. Boyd Construction Co., Inc.*, 769 F.2d 1084 (5th Cir. 1985), is sufficient to dispel the confusion and explode the argument.

In *McKay*, a Wisconsin resident sued a Mississippi corporation and the Mississippi State Highway Department in a Mississippi state court. The corporate defendant removed. The federal district court granted it a summary judgment and dismissed the Highway Department. The Fifth Circuit, on appeal, vacated, remanded, and directed that the district court remand to the state court in view of the 11th Amendment's bar to its exercise of jurisdiction over an agency of the state. 769 F.2d at 1086. The court noted that the Highway Department had not waived, by failing to raise, the 11th Amendment objection, precisely because it was jurisdictional. *Id.* The court also commented that while the removal was technically infirm in that the removing defendant was a citizen of the forum state, the technical infirmity was waived when plaintiff failed to object to it. 769 F.2d at 1087. Thus, as *McKay* illustrates, technical defects in removal procedure are waivable, but issues that go to the heart of federal jurisdiction may be raised at any time, either by the parties or by the court.

Not one of plaintiffs' authorities suggests anything to the contrary.[14] Indeed, this Court has clearly stated that parties may not confer subject matter jurisdiction on a removal court by consent or waiver. *American Fire & Casualty Co. v. Finn*, 341 U.S. 6, 71 S. Ct. 534, 95 L. Ed. 702 (1951).

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[14] *See* Harris v. Edward Hyman Co., 664 F.2d 943 (5th Cir. 1981) (failure of served defendant to join in removal petition waivable); Fristoe v. Reynolds Metals Co., 615 F.2d 1209 (9th Cir. 1980) (late filing of removal petition waivable); Johnson v. Odeco Oil and Gas Company, 679 F. Supp. 604 (E.D. La. 1987) (prohibition against removal of Jones Act claim waivable); Commercial Associates v. Tilcon Gammino, Inc., 670 F. Supp. 461 (D.R.I. 1987) (similar to McKay); Roberts v. Vulcan Material Company, 558 F. Supp. 108 (M.D .La. 1983) (follows Harris); *see also* Hartford Acc. & Indem. Co. v. Costa Lines Cargo Services, Inc., Nos. 89-3020 and 89-3273, slip op. (5th Cir. May 31, 1990).

Since complete diversity is jurisdictional, plaintiffs could not have waived, by delay in asserting them[15] or participation in collateral pre-trial proceedings, the objections to removal that they in fact did make. It follows that they were not impeded in their discovery efforts by reasonable fear of waiver of their remand objections and, consequently, that their failure to do any useful discovery before the remand and summary judgment motions were heard and decided remains unexplained.

C. Plaintiffs' third argument for issuance of the writ depends on a misreading of this Court's recent decision in *Carnegie-Mellon University v. Cohill*, 484 U.S. 343, 108 S. Ct. 614, 98 L. Ed. 2d 720 (1988). Generously construed, the argument is plaintiffs' old one that court policy requires remand wherever a plaintiff's allegations, uncritically accepted, state a claim for relief against a nondiverse defendant that can withstand a motion to dismiss under Fed. R. Civ. P. 12(b)(6).[16]

Cohill didn't have the opportunity to support that argument. The issue there was whether a federal district court, in a properly removed case, had the discretionary authority to remand, rather than dismiss, state claims over which it had had pendent jurisdiction when the federal-law claims on which jurisdiction was based were eliminated by the plaintiff's post-removal voluntary dis-

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[15] Plaintiffs' reliance on 28 U.S.C. § 1447(c) (1988), is seriously misplaced. The amendment to § 1447(c) was adopted in 1988 and took effect in May 1989, months *after* entry of final judgment against plaintiffs in this case. Even in newer cases, it calls for prompt filing—within 30 days of removal—of such remand motions only as depend on a "defect in removal procedure." It does not suggest that jurisdictional defects, such as lack of complete diversity, can be cured by a tardy objection.

[16] It is an unstated premise of plaintiffs' argument that the hypothetical motion will be heard on the face of the papers, without the admission of factual matter that would require the district court to handle it as a motion for summary judgment under Rule 56.

missal of them. The Court held that a district court has just that discretion, to be exercised by it with a view toward promoting "the values of economy, convenience, fairness, and comity." 484 U.S. at 353, 357, 108 S. Ct. at ——, 98 L. Ed. 2d at 731, 734.

Cohill, therefore, has no application to this case, except perhaps to the extent that it reminds litigants and judges of the interest that they all have "in the prompt and efficient resolution of controversies based on state law." 484 U.S. at 353, 108 S. Ct. at 620, 98 L. Ed. 2d at 731.[17] It is, of course, the prompt and efficient disposition of this claim that plaintiffs most complain about.

D. Plaintiffs' last argument for issuance of the writ is to the effect that the court misconstrued and misapplied Louisiana law in confirming Officer McInnis' fraudulent joinder and dismissing Sizeler Management. These defendants have already addressed the substance of the argument.[18] It remains only to deal with the Fanguy affidavit and with plaintiffs' emphatic reliance on the decision in *Willie v. American Cas. Co.*, 547 So. 2d 1075 (La. App. 1st Cir. 1989).

Addie Fanguy was, like Officer McInnis, a New Orleans policeman. He participated in the investigation of Mr. Carriere's murder. Plaintiffs rely on his affidavit about the statements Officer McInnis made immediately after the murder to attempt to raise a genuine issue of material fact about Officer McInnis' exposure.

Officer Fanguy's affidavit was, first of all, suspect. Officer Fanguy signed it on June 27, 1988, but it was not produced to the defendants until July 5, 1988. Sears immediately noticed his deposition and attempted to serve

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[17] A defendant's interest in the federal forum after removal is, of course, a legitimate interest worthy of protection itself. *See* Hensgens v. Deere & Co., 833 F.2d 1179 (5th Cir. 1987).

[18] See text at 12-14, *supra*.

him with a subpoena for it, in order to test the averments made in the affidavit, but Officer Fanguy avoided service. The police department itself, after service of a deposition subpoena duces tecum on it and considerable negotiation with the city attorneys, produced what was represented to be that part of the Carriere murder investigation that pertained to Officer McInnis, but it did so only on July 12, 1988, the day before the hearing on the remand motion. Counsel's examination of the record extract showed it to be entirely consistent with Officer McInnis' original affidavit.[19] The district court struck Officer Fanguy's affidavit, along with all of the rest of the affidavits plaintiffs submitted.

But even if Officer Fanguy's affidavit is to be considered, there is still no genuine issue of material fact. Plaintiffs' argument that there is turns solely on the affidavit's having recited that Officer McInnis told Officer Fanguy during the investigation that he "should have" accompanied Carriere to the loading dock, and a legal dictionary definition that read the concept of obligation into the considered use of the term "should" is unpersuasive without the further showing that Officer McInnis had Black's in mind when he said whatever he did say to his brother officer. Indeed, the pertinent usage note in the American Heritage Dictionary of the English Language (1969) explains that "[*s*]*hould*, in indicating obligation or necessity, is somewhat weaker than *ought* and appreciably weaker than *must* and *have to*."

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[19] Plaintiffs' suggestion, at page 15 of their petition, that Fanguy's affidavit, "based upon statements made immediately after the incident," is more credible than McInnis', "submitted long after the fact and in support of summary judgment," is disingenuous at best. McInnis' affidavit was signed on April 12, 1988, Fanguy's 2½ months later. The contemporaneous record supports McInnis' version better than it does Fanguy's, to the extent that one can wring a factual conflict out of them. But in fact there is no material conflict, as the district court and Fifth Circuit both found. *See* Carriere v. Sears, Roebuck and Co., 893 F.2d 98, 101 (5th Cir. 1990).

There is, moreover, nothing in all this to suggest an awareness of such circumstances on Officer McInnis' part that he could be said to have been "substantially certain" that Mr. Carriere would be shot and killed. And that, it must be remembered, is what Louisiana law on intentional acts in the workplace requires. The *obligation* at which plaintiff seem to be aiming won't do unless there is proof as well of the defendant co-employee's knowledge, to a substantial certainty, that harm of the type that actually befalls the plaintiff or the plaintiff's decedent will ensue. Officer Fanguy's affidavit, read as liberally as plaintiffs desire, doesn't reach that far.

Plaintiffs rely on *Willie* in seeking to salvage their claim against Sizeler Realty/Management. Plaintiff there had been abducted from the parking lot of a shopping center in Hammond, Louisiana, and was shot and injured; her companion, also abducted, was shot and killed. The young couple had gotten a late start and had missed the movie they had planned to attend. They were not in the parking lot to patronize one of the center's businesses, but the court rejected the contention that that fact relieved the center operator from all responsibility to provide reasonably for their safety, noting that the status—whether business invitee or trespasser—of an individual on another's property does not, under Louisiana law, determine the duty owed that person by the property owner. 547 So. 2d at 1084-85.

There is nothing surprising about that, but nothing pertinent either. *Willie* says nothing whatever about a property owner's duty to provide reasonably for the security of persons on neighboring premises. Sears, it must be remembered, owned and secured its retail store and the ground surrounding it. Sizeler Management, the center operator, had access but no responsibility.

CONCLUSION

There is, under this Court's Rule 10, no reason to grant the writ of certiorari plaintiffs seek. The petition identifies neither a conflict between the Fifth Circuit's decision and that of any other court of appeals or of this Court nor an important question of federal law that needs settling by this Court. The decisions below were rendered promptly, efficiently, and entirely in accordance with justice. The petition should be denied.

Respectfully submitted,

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(4)

NO. 89-1885

In the
Supreme Court of the United States

OCTOBER TERM, 1990

THAIS CARRIERE, INDIVIDUALLY AND ON BEHALF OF RICHARD DARCEY CARRIERE, SAMUEL CARRIERE, V, LEANORA PAIGE CARRIERE TOMENY, THAIS MARIE CARRIERE AND CLAYTON JOSEPH CARRIERE

Petitioners

VERSUS

SEARS, ROEBUCK & COMPANY, SIZELER REALTY COMPANY, SIZELER REAL ESTATE MANAGEMENT COMPANY, INC., CONNECTICUT GENERAL LIFE INSURANCE COMPANY, ON BEHALF OF ITS SEPARATE ACCOUNT R. WILLIAM MCINNIS AND ALLSTATE INSURANCE COMPANY

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

PAGE

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

INTRODUCTION 1

I. PLAINTIFFS WERE NOT GIVEN SUFFICIENT OPPORTUNITY TO DEFEND AGAINST SUMMARY JUDGMENT 1

II. PLAINTIFFS WERE RIGHT TO BE CAUTIOUS ABOUT THE WAIVER OF THE RIGHT TO REMAND 2

III. A DISTRICT COURT HAS NO JURISDICTION TO GRANT A SUMMARY JUDGMENT UNTIL THE REMAND DECISION IS INDEPENDENTLY DECIDED 4

IV. THE FIFTH CIRCUIT APPROACH WOULD ALLOW MANIPULATION OF THE FEDERAL COURTS BY ENTERPRISING DEFENDANTS 6

V. THE COURT BELOW INCORRECTLY APPLIED LOUISIANA LAW 9

CONCLUSION 10

CERTIFICATE OF SERVICE 11

APPENDIX A A-1

APPENDIX B A-4

TABLE OF AUTHORITIES

PAGE

Allen v. Ferguson, 791 F.2d 611 (7th Cir. 1986) 6

Cupp v. Federated Rural Electric Ins. Co., 459 So. 2d 1337 (La. App. 3d Cir. 1984) 9

Erie Technology Products, Inc. v. Centri Engineering, Inc., 52 F.R.D. 524 (M. D. Penn. 1971) 7

Fontenot v. Aetna Ins. Co., 225 So. 2d 648 (La. App. 3rd Cir. 1969) 9

Lyons v. Airdyne Lafayette, Inc., 558 So. 2d 277 *rev'd* 563 So. 2d 260 (LA. 1990) 9

Walker v. Savell, 535 F.2d 536 (5th Cir. 1964) 6

MAY IT PLEASE THE COURT:

INTRODUCTION

The reply briefs of defendants, Sizeler, Sears and Allstate, are quite heated in their rhetoric, but, in fact, offer little to refute petitioners' main point: the procedure of combining the remand motion with a motion for summary judgment is an unconscionable rush to judgment that deprives these, and plaintiffs to follow, of fundamental procedural protections.

I.
PLAINTIFFS WERE NOT GIVEN SUFFICIENT OPPORTUNITY TO DEFEND AGAINST SUMMARY JUDGMENT

This Honorable Court would be seriously mislead by depending on defendants' chronology of events in this case. For example, the Sears/Allstate brief says:

> Defendants raised the issue of fraudulent joinder explicitly in their removal petition served on plaintiffs . . . on or about March 7, 1988, fully four months - not six weeks- before the July 13th hearing on the remand and *summary judgment* motions.
>
> Sears/Allstate Reply Brief at 9 (emphasis added)

Through a bit of brief writer's slight of hand Sears/Allstate notes only the date on which "fraudulent joinder" was raised compared to the date of the hearing on the "remand *and* summary judgment motions". Obviously what they do *not* mention is the date of the summary judgment motion. However, the motion for summary judgment was not received by petitioners until on or about May 24, 1988, allowing only 49 days to prepare to oppose a summary judgment; which would have supported petitioners' motion

to continue.

However, the District Court *did not rule* on petitioners' motion to continue and heard the summary judgment on July 13. Sears/Allstate suggest that petitioners had not supported their motion to continue with a specific affidavit by petitioners' counsel. This is clearly incorrect. Counsel's affidavit, attached as Exhibit "A", makes numerous specific references to the discovery needed to oppose summary judgment.

To add insult to injury during this rush to judgment, petitioners were served *on the morning of the hearing* with a motion to strike certain of petitioners' affidavits submitted in opposition to summary judgment. The lateness of this motion should have alone required a continuance. Nonetheless, the hearing went on. Two days later, *without giving petitioners their requested opportunity to oppose the motion to strike,* see attached Exhibit "B", the court issued a minute entry, granting summary judgment in favor of Sears and Sizeler and granting Sears' Motion to Strike. Moreover, the District Court struck all four of petitioners' affidavits when the technical objections were raised only with respect to three of them. Consequently, the core of petitioners' case was gutted by a summary judgment that they had only 49 days to prepare for, despite good reason shown for a continuance.

II.
PLAINTIFFS WERE RIGHT TO BE CAUTIOUS ABOUT THE WAIVER OF THE RIGHT TO REMAND

Respondents all admit in their reply briefs that many, if not most, grounds for remand can be waived by proceeding with the development of the removed case prior to the determination of the right to remand *vel non.*

Somehow respondents believe that just because subject matter jurisdiction cannot be waived that the Hobson's Choice poses no problem. Nothing could be further from the truth. Indeed, almost every basis for remand other than subject matter jurisdiction must be raised by motion promptly after removal. Even before the 30 day rule of the 1988 amendments to 28 U.S.C. § 1447, this rule of promptness was in effect.

Of course, such a rule makes sense in order to resolve the removal question as quickly as possible, However, it makes little sense if a motion to remand puts the case on a fast track to summary judgment. This is true for two reasons. First, it is basically unfair to require a plaintiff who chooses a state court forum in effect to prepare and litigate the substance of his claim when jurisdiction has not yet been established. Second, it allows the removing party to manipulate the federal judicial system by using that system as the forum for development of the case, if not for ultimate resolution.

Perhaps it is the realization by our federal courts of these significant problems which has placed respondents in the position of arguing that the remand/summary judgment procedure used in this case was routine, while at the same time leaving them unable to cite a *single* case that holds such a procedure is approved. Neither reply brief cites any case holding that it is proper, appropriate or within the federal rules to combine a remand motion and a motion for summary judgment.

A futile attempt at such authority is contained in the Sears/Allstate brief at page 16 where it is said that in the *Keating* case "the Fifth Circuit directed that the course-and-scope issue be determined '[b]y summary judgment or otherwise' 'but short of 'a full dress trial on the merits.' Hardly an endorsement for the propriety of the new

procedure.

What respondent does not say is that the procedure actually used by the district court, and approved by the Fifth Circuit in *Keating*, was the one urged by petitioners herein. That is, the district court agreed that the non-diverse defendants were fraudulently joined and therefore remand was refused. However, the non-diverse defendants were *dismissed for failure to state a claim against them upon which relief could be granted.* In other words, the *Keating* court did *not* force plaintiffs into a premature summary judgment but rather granted a motion to dismiss under Federal Rule 12 (b) (6). Consequently, *Keating*, even with its dictum, is no authority for respondents' position.

This point is extremely important for purposes of this Honorable Court in deciding the general significance of this writ. There is no authority for the procedure used, yet respondents would have this Court believe that the trial court "squeeze play" was simply a matter of routine not befitting this high court's attention. If the instant opinion stands it lurks as a tool to surprise other litigants who have rightly depended upon the total absence of any precedent supporting this procedure. This Court should simply decide, and thereby warn all litigants faced with removal, that they either will or will not have to prepare for summary judgment before the fundamental jurisdictional question is decided.

III.
A DISTRICT COURT HAS NO JURISDICTION TO GRANT A SUMMARY JUDGMENT UNTIL THE REMAND DECISION IS INDEPENDENTLY DECIDED

Respondents seem not to understand the critical jurisdictional importance of keeping separate the remand decision from any substantive decision on the merits. The Sizeler brief, for example, characterizes petitioners' posi-

tion with some ridicule and disbelief:

> One must ask: Do petitioners suggest that the [sic] a different result should obtain if the remand motion were heard at 9:00 a.m. and the summary judgment motions at 10:00 a.m.?
>
> Brief of respondent
> Sizeler at 11.

Respondent completely misses the point! It is not simply the timing of the motion that is important, but rather determining the power to act. If a summary judgment is considered contemporaneous with a motion to remand it is impossible for a court to keep separate a consideration of the merits from a consideration of its very jurisdictional power to act. Plaintiffs are entitled to be shown the basis of the court's jurisdiction before it ends the case on it merits. Consequently, in addition to the timing, the very procedure itself must be questioned. Does a remand combined with a summary judgment "bootstrap" the court's jurisdiction?

Clearly, such a procedure *does* bootstrap jurisdiction. The court decides the merits of the case *because* it "has jurisdiction", it has jurisdiction *because* of its preliminary assessment of the merits. Plaintiffs are faced with a clear "catch 22".

Professor Wright has explained the significance of the difference between the use of Federal Rule 12(b) and summary judgments.

Given the difference, Professor Wright notes how uniquely inappropriate it is to use summary judgments to deal with jurisdictional questions:

> In general, courts have ruled that summary judgment is an inappropriate vehicle for raising a

> question concerning the courts subject matter jurisdiction, personal jurisdiction or venue, or a defect in the parties. . . .
> . . . If a court has no jurisdiction, it has no power to enter a judgment on the merits and must dismiss the action. In addition, a dismissal for want of jurisdiction has no res judicata effect and the same action subsequently may be brought in a court of competent jurisdiction. A summary judgment, on the other hand, is on the merits and purports to have a res judicata effect on any later action. The court's role on the two motions is also different. On a motion attacking the court's jurisdiction, the district judge may resolve disputed jurisdictional fact issues. On a motion under Rule 56 he simply determines whether any issues of material fact exist that require trial.
>
> Wright, Miller & Kane,
> *Federal Practice & Procedure: Civil 2d* § 2713.

The Seventh Circuit has recognized this principle in the context of competing motions to remand and a motion to dismiss for lack of personal jurisdiction, *Allen v. Ferguson*, 791 F.2d 611, 615, 616 (7th Cir. 1986).

Allen, supra, puts the Seventh Circuit at odds with the Fifth Circuit at least with respect to the preeminence of the remand/jurisdiction question. *See also, Walker v. Savell*, 535 F.2d 536 (5th Cir. 1964). To allow the current Fifth Circuit view to prevail is to invite the exercise of federal jurisdiction where it might not exist, under circumstances where it will be impossible to challenge. Federalism and fairness fall prey to speed.

IV.

THE FIFTH CIRCUIT APPROACH WOULD ALLOW MANIPULATION OF THE FEDERAL COURTS BY ENTERPRISING DEFENDANTS

The purpose of the summary judgment procedure is clearly to decide the case *on the merits*. Consequently, when properly administered, the motion for summary judgment should only be allowed after sufficient factual development has been allowed. While it is true that petitioner herein has suffered from a lack of sufficient time to conduct discovery prior to summary judgment, this Court must also evaluate the general impact of the new Fifth Circuit procedure allowed by this case.

That is, if summary judgments can be combined with remand motions, will defendants be able to avail themselves of federal jurisdiction, even where it does not exist, at least to the point of trial.

Federal Rules of Civil Procedure Rule 56 clearly encourages extensive discovery and factual development prior to ruling on a motion for summary judgment. *See* F.R.C.P. Rule 56(c)(e). Also, subsection (f) of the Rule provides for continuances to facilitate factual development through discovery prior to a summary judgment. *See* F.R.C.P. Rule 53(F).

Consequently, extensive discovery may be needed before a summary judgment can be made consistent with the Rule. Some courts have gone so far as to say that discovery sufficient to litigate might be necessary before a summary judgment can be entertained. *See, e.g., Erie Technology Products, Inc. v. Centri Engineering, Inc.*, 52 F.R.D. 524 (M. D. Penn. 1971).

Given this concern with proper factual development prior to summary judgment the Fifth Circuit remand/summary judgment procedure threatens to embroil federal courts in extensive pretrial proceedings before jurisdicition is ever determine. Indeed, the federal courts, both trial and appellate, will be involved in full pretrial preparation of the

case, in order to follow diligently Rule 56, only to decide finally that the motion to remand should be granted, thereby returning a state court case, stamped with the imprint of the federal court, to the state court for trial.

An enterprising lawyer who believes that the federal system will benefit his case, at least pre-trial, will seek sanctuary in the fraudulent joinder hovel. And he need not be acting in bad faith in order to maximize this tactical advantage, it is handed to him by the combined remand/summary judgment rule.

If, in fact, remand would be decided first there would be no need for the extensive factual development required for summary judgment. Remand could be achieved without the excessive involvement of the federal courts.

If, however, the Fifth Circuit rule is followed, any plausible suggestion of fraudulent joinder lays open the entire panoply of pre-trial entanglement before remand is ever reached.

Hence the Fifth Circuit rule either hastens the summary judgment decision to achieve resolution of the remand issue, thereby forcing the opponent of removal prematurely and unfairly to defend the merits. Or, it prolongs the remand decision in true service of Rule 56, thereby imposing federal court management on a case that might be returned to state court.

In either event, either removal/remand policy or summary judgment policy is thoroughly undermined for no good end. Simply putting the horse before the cart would solve the problem. Thus, petitioners urge this Court to correct this error in the Fifth Circuit procedure.

V.
THE COURT BELOW INCORRECTLY APPLIED LOUISIANA LAW

Without repeating petitioners' original brief, it is important to make this Court aware of a recent Louisiana Supreme Court case that clearly shows that petitioners would never have suffered a summary judgment in this case in a Louisiana court. *Lyons v. Airdyne Lafayette, Inc.*, 558 So. 2d 277 *rev'd* 563 So. 2d 260 (LA. 1990) involved the same issue that was so critical in the summary judgment in this case, that is, the intentional act exception to the Louisiana Worker's Compensation Statute. In *Lyons* the plaintiff alleged that he was injured on the job when his co-employee unleashed a stream of compressed air from a compressor unit. Plaintiff, of course, alleged that it was intentional, while defendants contended it was negligent at best.

The Louisiana Supreme Court reversed a summary judgment for defendant in a *per curiam* opinion, which is reproduced here in its *entirety*:

> There is a genuine issue of material fact whether plaintiff's co-employee intentionally shot the stream of compressed air at plaintiff and injured him or whether the co-employee accidentally released the stream while repairing the compressor. There is circumstantial evidence from which one could reasonably infer that the act was intentional, and weighing of factual evidence is inappropriate on a motion for summary judgment. The case of *Caudle v. Betts*, 512 So. 2d 889 (La. 1987), while presenting similar issues, was decided after trial on the merits. 536 So.2d. at 260.

Accord: Cupp v. Federated Rural Electric Ins. Co., 459 So.2d 1337 (La. App. 3d Cir. 1984); *Fontenot v. Aetna Ins. Co.*, 225 So. 2d 648 (La. App. 3rd Cir. 1969).

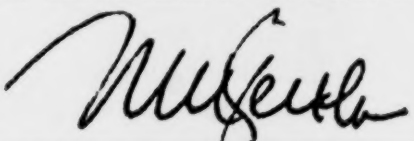
The highest state court in a single paragraph brushes away the essence of respondent's victory below. Such dramatic differences between state and federal courts are not suppose to exist on questions of state law. Consequently, the Fifth Circuit remand/summary judgment procedure combined with the erroneous application of state law puts an unacceptable premium on a defendant's access to a federal forum. It should not be allowed.

CONCLUSION

Respondents' reply brief simply does not overcome the substantial arguments about fairness and federalism that petitioners have urged upon this Court. If the Fifth Circuit approach is allowed to stand, the litigation burden on federal courts will be greatly increased and the potential for unfairness will lurk in virtually every removal case.

Respectfully submitted,

GERTLER, GERTLER & VINCENT



BY: _____

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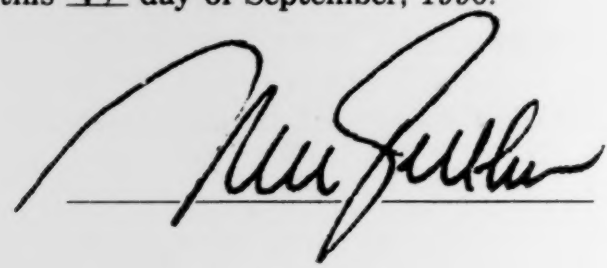
CERTIFICATE OF SERVICE

I certify that a copy of the foregoing has been furnished to all opposing counsel of record by U.S. Mail, postage prepaid this 17th day of September, 1990.



UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

THAIS CARRIERE, ET AL	*	CIVIL ACTION
VERSUS	*	NO. 88-0974
SEARS, ROEBUCK AND CO., ET AL	*	SECTION "M"
	*	MAG. NO. 6

* * * * * * * * * * * * *

AFFIDAVIT

STATE OF LOUISIANA

PARISH OF ORLEANS

BEFORE ME, the undersigned Notary, personally came and appeared M. H. GERTLER, who, after being first duly sworn, did depose and state that:

I.

I am an attorney in the law firm of Gertler, Gertler & Vincent, attorneys for Thais Carriere, Samuel Carriere, V, Richard Darcey Carriere, Leanora Paige Carriere Tomeny, Thais Marie Carriere and Clayton Joseph Carriere, plaintiffs in the above captioned matter. I submit this affidavit in support of plaintiffs' motion to continue the hearing on defendants' motion for summary judgment.

II.

In order to adequately prepare to oppose the defendants' motion for summary judgment, it is necessary that

plaintiffs obtain a listing of the reported criminal incidents at the Lake Forest Plaza Shopping Center for a period of time prior to the relevant incident. Additionally, plaintiffs will seek to compel defendant, Sears, Roebuck and Company, to answer interrogatories and requests for production propounded upon defendants on or about February 26, 1988, as the answers proffered by defendants on April 13 were incomplete.

III.

The sole reason that plaintiffs suspended efforts to conduct discovery was due to the procedural posture of the case, namely that the court has yet to establish that it can in fact properly exercise jurisdiction over this case; once this issue is decided, plaintiffs will promptly proceed with all facets of this case.

IV.

Many of the allegations made against defendants consist of subjective mental impressions known only to defendants, i.e., knowledge about the dangerous condition of the loading dock and parking areas in question, intent of defendants Sears, Roebuck and Company and McInnis, as well as information concerning the security policy and procedures of defendants companies, i.e., Sears, Roebuck and Company, Sizeler Realty Company, and Sizeler Real Estate Management Company, which will require depositions of the corporate defendants through their representative, depositions of their executive officers as well as the individual defendant.

V.

The aforementioned discovery material is reasonably

likely to demonstrate the existence of a genuine dispute of material facts with respect to plaintiffs' allegations of intentional torts against Sears, Roebuck and Company and William McInnis and the allegations of negligence against Sizeler Realty Company and Sizeler Real Estate Management Company.

/s/ M. H. Gertler
M. H. GERTLER

SWORN TO AND SUBSCRIBED

BEFORE ME THIS 7th DAY

OF JULY, 1988.

/s/ Rodney Vincent
NOTARY PUBLIC

APPENDIX B

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NOTARY IN OFFICE

July 13, 1988

The Honorable Peter H. Beer
Judge, United States District Court
Eastern District of Louisiana
500 Camp Street
New Orleans, Louisiana 70130

RE: THAIS CARRIERE, ET AL VS.
SEARS, ROEBUCK AND COMPANY, ET AL

Dear Judge Beer:

As per my request at oral argument, I would appreciate the opportunity to respond to defendant's Motion to Strike Affidavits if you are going to consider that motion in the context of the Motion to Remand and especially, since the question of my good faith has been put at issue.

As I indicated, I was only served with the Motion to Strike on the morning of the hearing.

Thank you for your consideration.

With kindest regards,

/s/ M.H. Gertler

M. H. GERTLER

MHG:cfl

cc: All counsel of record